Nos. 20785 and 21377

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD COMPANY and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated,

Appellants,

vs.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board, et al.,

Appellees.

Opening Brief for Appellants

Appeals from the District Court for the Northern District of California, Southern Division

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JURISDICTIONAL STATEMENT

These are two appeals which were consolidated for briefing and oral argument by the November 2, 1966, Order of this Court. Both appeals are from orders of the United States District Court for the Northern District of California which were entered in a

single action then pending below. Appeal No. 20785 is from the November 24, 1965, order of the District Court denying appellants' motion for a preliminary injunction. Appeal No. 21377 is from the September 13, 1966, order of the District Court denying appellants' renewed motion for a preliminary injunction, granting appellees' motion for summary judgment, and entering final judgment against appellants.

The underlying action was brought by appellants, suing on their own behalf and on behalf of all other railroads similarly situated, to obtain a declaration concerning the unlawfulness of certain unemployment benefits being paid by appellees from the Railroad Unemployment Insurance Account, as well as preliminary and permanent injunctions against such payments (R. 1-31).* The District Court's jurisdiction was invoked under the provisions of 28 U.S.C. Sections 1337 and 1331(a) (1964), (R. 4). Timely notices of appeal were filed with respect to each of the District Court's decisions (R. 148, 255), and the jurisdiction of this Court therefore rests upon 28 U.S.C. Sections 1291 and 1292(a)(1) (1964).

STATEMENT OF THE CASE

1. Introduction

This is an action for declaratory relief with respect to the lawfulness of very substantial unemployment benefits paid and being paid by appellees from the Railroad Unemployment Insurance Account (R. 1-31). Plaintiffs and appellants are the Western Pacific Railroad Company and the Southern Pacific Company, suing on their own behalf and on behalf of all other railroads similarly situated. Appellants represent over 775 railroads which operate more than ninety-five percent of the total railroad mileage in the United States, and which contribute more than eighty-five

*All record references in this brief are to the clerk's transcript as included in the Transcript of Record in this Court. As the decisions of the District Court were based entirely upon written materials, there is no reporter's transcript.

percent of all funds paid into the Railroad Unemployment Insurance Account by carriers (R. 2-3, 188). Defendants and appellees are the members of the Railroad Retirement Board, the Regional Directors of that Board, and certain of its administrative personnel. The unemployment benefits which are challenged in this action are being paid to certain firemen, known as "C(6) firemen," whose jobs were eliminated under the terms of an award of a special arbitration board convened in 1963 pursuant to joint Congressional resolution (R. 31a-v).*

Under the terms of the Award (R. 31 i-k; App. A, pp. 1-2), each of the C(6) firemen, after receiving notice that his particular job had been eliminated, was given the choice of accepting a "comparable job," with retention of all seniority rights and with guaranteed earnings for five years, or of rejecting that job, forfeiting all "seniority rights and relations," and receiving, in lieu thereof, a severance allowance averaging more than $5,600 (R. 9). Thousands of the C(6) firemen who were offered and had rejected the comparable jobs thereafter made application for unemployment benefits to be paid out of the Unemployment Insurance Account (R. 18, 171, 189-90). Over the objections of the railroads (R. 18-19), appellees have paid and are now paying very substantial unemployment benefits to such firemen—to date, the payments have admittedly come to more than $2,500,000 (R. 18, 199-200, 228).

Appellants contend that the payment of these benefits was and is in manifest violation of the disqualification provisions of the Railroad Unemployment Insurance Act,† the statute from which appellees draw their authority; that in making these payments, appellees failed and are now failing to follow the mandatory

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*Public Law 88-108, 77 Stat. 132 (1963). The relevant provisions of the arbitration award are set forth in Appendix A of this brief.

†52 Stat. 1094 (1938), as amended, 45 U.S.C. §§ 351-67 (1964), as amended, 45 U.S.C. §§ 351-404 (Supp. 1966). The relevant provisions of the Act are set forth in Appendix B of this brief.

procedural provisions of the Act, which require "findings of fact" with respect to each claim for benefits; and that, as a consequence of these matters, the payments were and are in excess of the jurisdiction of the Board (R. 1-31).

2. The Railroad Unemployment Insurance System

The Railroad Unemployment Insurance System was established and is defined by the Railroad Unemployment Insurance Act (hereinafter referred to as "the Act"). The Act, in summary, provides for the establishment of an Unemployment Insurance Account (hereinafter referred to as "the Account") to be maintained by the contributions of the employers (Sections 8, 10); for the payment of unemployment benefits from the Account to persons qualified for such benefits (Sections 2-4); for the claims procedures relating to the application for such benefits (Section 5); and for the administration of the Account and the determination of eligibility for and payment of such benefits by the Railroad Retirement Board (hereinafter referred to as "the Board"), an organization previously established by the Railroad Retirement Act of 1935 (Section 12). All "carriers" within the meaning of the Interstate Commerce Act and all employees of those carriers are defined, respectively, as "employers" and "employees" who are subject to the Act. Section 1(a),(b),(d). Appellants and all of the members of the class of railroads on whose behalf this action has been brought are employers subject to the Act who contribute to the Account (R. 2-3).

Under the terms of the Act, unemployment benefits cannot be paid to an employee unless he is "able to work and is available for work." Section 1(k). Nor can benefits be paid to an employee who falls within the "Disqualifying Conditions" of Subsection 4 (a-2) of the Act, which provides in relevant part:

> "(a-2) There shall not be considered as a day of unemployment, with respect to any employee—

"(i) (A) subject to the provisions of subdivision (B) hereof, *any of the days in the period beginning with the day with respect to which the Board finds that he left work voluntarily,* and continuing until he has been paid compensation of not less than $750 with respect to time after the beginning of such period;

"(B) *if the Board finds that he left work voluntarily with good cause, the provisions of subdivision (A) shall not apply . . . .*

"(ii) *any of the thirty days beginning with the day with respect to which the Board finds that he failed, without good cause, to accept suitable work available on such day and offered to him,* or to comply with instructions from the Board requiring him to apply for suitable work or to report, in person or by mail as the Board may require, to an employment office." (Emphasis added.)

Thus, under the terms of the Act, an employee is disqualified to receive unemployment benefits if the Board finds that "he left work voluntarily," unless it also finds that he "left work voluntarily with good cause." And even if there is a finding that a man left work voluntarily but with good cause, he is nevertheless disqualified for a thirty day period if the Board finds that "he failed, without good cause, to accept suitable work available . . . and offered to him." It should be noted that, as Section 4(a-2) strongly suggests, the Board is under a statutory duty to make findings of fact with respect to the conditions of eligibility. Section 5(b) in effect so provides:

"5(b) The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits."

The Railroad Unemployment Insurance Account, the fund from which unemployment benefits under the Act are paid, is maintained almost entirely by the contributions of the employers subject to the Act. No payments whatever are made into the

Account by the employees, and the payments may not be passed on to the employees. Section 8(g). Appellants and the other members of the class of railroads whom they represent contribute approximately eighty-five percent of all funds paid into the Account (R. 188). During fiscal years 1960-64, the total annual contributions to the Account have ranged between approximately $144,000,000 and $153,000,000 (R. 85), and the contributions by the class appellants represent have therefore varied between approximately $122,400,000 and $140,000,000 annually.

In theory at least, the percentage rate of contributions required of appellants and other employers should fluctuate up or down, depending upon the total amount of money currently standing in the Account. Section 8(a). Since 1950, however, the balance standing in the Account has diminished from a surplus of approximately $780,000,000 to a deficit of approximately $250,000,000,* a reduction amounting to more than one billion dollars. As the Account has wasted away, the rate of contribution required of employers has, since 1955, steadily and irreversibly increased. 20 C.F.R. § 345.2(a) (1966). By 1963, and despite the fact that the then maximum statutory rate of contribution had been in effect since June of 1959 (and had even been raised temporarily during 1962), it had become apparent that the deficit in the Account could not be eliminated or significantly reduced without permanently raising the contribution rate; and, in Public Law 88-133, 77 Stat. 222 (1963), Congress once again raised the maximum rate of contribution, this time to an all-time high of four percent. This is the rate at which contributions presently are being made by appellants and by all other members of the class on whose behalf this action has been brought (R. 22). Mr. Thomas M. Healy, one of the members of the Railroad Retirement Board, has predicted that any increased deficit in the Account will

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*Railway Express Agency, Inc. v. Kennedy, 189 F.2d 801, 805 (7th Cir. 1951), *cert. denied*, 342 U.S. 830 (1951); R. 84; Railroad Retirement Board, The Monthly Review, Vol. 27, No. 10 (Oct. 1966).

not only postpone the date upon which contribution rates may be decreased under the terms of the Act, but may well result in action by Congress to increase the rate of contribution in order to reduce or eliminate the deficit (R. 200).

3. The Arbitration Award

For several years prior to 1963, the Nation's railroads and the Railroad Brotherhoods representing their firemen struggled unsuccessfully to resolve the conflict between the economic imperative of eliminating unneeded firemen jobs and the employment dislocations and human hardships which could result from such changes. Finally, and in August of 1963, Congress took the matter in hand and directed that the issues be formally resolved by a special arbitration board. Public Law 88-108, 77 Stat. 132 (1963). The arbitration board was convened on September 11, 1963 (R. 31b). The carriers and the employees were each represented by two arbitrators and the remaining three arbitrators were named by the President of the United States. The Board received presentations from the United States Secretary of Labor and held public hearings for a period of twenty-nine days during November of 1963. On November 26, 1963, the Board entered its formal award, after "a full consideration of the evidence and arguments upon the entire record" (R. 31d).

Under the terms of the Award, the only positions to be eliminated were those of certain of the "firemen (helpers)" on non-steam freight engine crews and on yard engine crews (R. 31e). With respect to such crews, each carrier was authorized to give to the local union chairmen lists of those existing engine crews which, in the judgment of the carrier, did not require the services of a fireman (R. 31e). The local chairmen then had the right to designate up to ten percent of such crews as to which the continued use of firemen would nevertheless be required (R. 31e-g). Thereafter, the carrier was authorized to separate from

service all firemen on any crews other than those designated subject, however, to the rights given to such firemen under subsequent provisions of the Award (R. 31g).

The rights of the firemen whose jobs were to be eliminated depended primarily upon length of service (R. 31g-k). The rights of those men presently involved—firemen having more than two and less than ten years' seniority—are described in paragraph C(6) of the Award (R. 31i-k; App. A., pp. 1-2). These "C(6) firemen," as they have come to be called, were to retain all their rights to engine service assignments unless and until "offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become qualified."* The offer of the "comparable job" was to include relocation expenses, accumulated seniority rights for purposes of vacations and other fringe benefits, and guaranteed annual earnings for a period of five years. If any man rejected a comparable job, the Award provided that he should: "[F]orfeit all of his employment and seniority rights and relations" and receive, in lieu thereof, a specified severance allowance. With respect to the average C(6) fireman, the severance allowance was something in excess of $5,600 (R. 9).

4. The Conduct of Appellees

The arbitration award was issued on November 26, 1963. Thereafter, thousands of C(6) firemen elected to terminate and forfeit their employment relationships and to receive the severance allowance provided in the Award.† Complete figures are

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*Thus, the "comparable job" which was offered, could be of equal or greater dignity than the job eliminated. Moreover, under paragraph D(2-3) of the Award, men who stayed on with the railroads in comparable jobs had the right to work as firemen to the extent that such positions became available in the future (R. 31 l-m).

†Most of these men had been offered and had rejected comparable jobs under the procedure contemplated by the Award but some had elected to

available only to the Board, but it is undisputed that between May 7 and October 31, 1964, alone, more than 3,200 C(6) firemen—about eighty-three percent of all those affected by the Award (R. 190)—elected to give up their work for the railroads, and that these 3,200 firemen collectively received in excess of $17,000,000 as severance allowances (R. 9). During the benefit year commencing July 1, 1964, more than 2,850 of the C(6) firemen who had taken the severance allowance filed claims with the Board for unemployment benefits payable from the Account (R. 18), and 1,000 further claims were filed during the benefit year commencing July 1, 1965 (R. 227).

It will be recalled that the Act forbids the payment of unemployment benefits to a man if "the Board finds that he left work voluntarily," unless the Board also finds that his leaving was "with good cause" (Section 4(a-2) (i)); that a man is also temporarily disqualified if "the Board finds that he failed, without good cause, to accept suitable work available . . . and offered to him" (Section 4 (a-2) (ii)); and that the Board, under the terms of the statute, is "directed to make findings of fact with respect to any claim for benefits" (Section 5 (b)). Despite the command of the statute, no individual findings of fact were ever made by the Board or by any of its employees with respect to the qualification or disqualification for unemployment benefits of any single one of the more than 3,000 C(6) firemen who had applied for unemployment benefits (R. 10-12, 16-17, 91-92). Nor were the individual circumstances of these men even considered by the Board in determining their eligibility for benefits (R. 91-92, 199-200). Instead, and on June 5, 1964, one H. L. Carter, Director of Unemployment and Sickness Insurance of the Board, issued a memorandum to the Board's Regional Directors which purported to eliminate altogether the disqualification problem under Section 4(a-2) (R. 31w-x).

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leave their work with the railroads and to receive the severance allowance even before comparable jobs had become available for offer to them (R. 16).

The Carter memorandum was in the form of a blanket ruling, applicable to all firemen covered by the Award, without reference to the particular circumstances. To eliminate the possibility that some men, in electing to "terminate their employment and seniority rights and relations" under the provisions of the Award might be held to have "left work voluntarily" without "good cause," the memorandum simply provided that a man's choice of "separation from service," with receipt of a severance allowance "will not affect his rights to unemployment benefits under the Railroad Unemployment Insurance Act" (R. 31w). To eliminate the possibility of temporary disqualification for failure to accept, as "suitable work," the comparable jobs which had been offered, the memorandum concluded that a C(6) fireman who rejected a comparable job "is not to be regarded as having failed to accept suitable work within the meaning of Section 4(a-2) (ii) of the Act" (R. 31w). The Carter memorandum did not purport to explain the basis for these rulings. Nor did it suggest or imply that anything further was to be done—either by way of findings of fact or otherwise—in order to determine the qualification for benefits of individual C(6) firemen who had rejected the comparable jobs and taken the severance allowances.

In fact, nothing further was ever done to comply with the procedural provisions of the statute, either by the Board or by any of its employees. It is admitted that, following the receipt of the Carter memorandum and pursuant to its instructions, the persons charged with the initial determination and payment of claims simply assumed, without any consideration of the individual circumstances, and without any findings of fact in that regard, that none of the C(6) firemen who had rejected a comparable job and taken a severance allowance could thereby be disqualified for unemployment benefits (R. 16-17, 91-92, 199-200).

Though more than $2,500,000 has already been paid out to C(6) firemen pursuant to the instructions in the Carter memo-

randum (R. 18, 199-200, 228), it appears that neither that memorandum, nor the advice which it contains, was ever formally considered by the Board. The most that can be said, according to a December 10, 1964, letter from appellee Howard W. Habermeyer, Chairman of the Board, is that, at some unspecified time, "the Board did informally approve the policy underlying [the Carter memorandum]" (R. 31 ah). The Habermeyer letter, however, went on to say:

> "It should be noted, however, that while the Management Member of the Board concurs generally in the view that the receipt by a fireman of severance allowances under the Award does not prevent the payment to him of unemployment benefits under the Act, he is of the opinion that matters of eligibility with respect to a claimant of benefits should be considered on an individual basis in each case." (R. 31ah-ai)

Neither appellants nor any other railroads were advised of issuance of the Carter memorandum (R. 18). Nor were any of the railroads given notice of the claims for benefits made by any of the C(6) firemen or given an opportunity to participate in or to be heard in connection with the adjudication of any of those claims (R. 18).* The Association of American Railroads, a voluntary non-profit organization whose members include appellants and the entire class they represent, objected repeatedly to the Board concerning the payment of unemployment benefits to the C(6) firemen without prior compliance with the mandatory procedural provisions of the Act (R. 18). But, by a two-to-one majority, the Board declined to alter the instructions contained in the Carter memorandum (R. 18-19, 31ah-ai).

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*Indeed, the Board has consistently taken the position that, except where the employment relationship of the applicant is in dispute, the employers have no right to be heard in connection with proceedings relating to the allowance of claims for benefits. See the October 18, 1950, letter of Mary B. Linkins, Secretary of the Board, as set forth in the Transcript of Record, pp. 15-16, Railway Express Agency, Inc. v. Kennedy, 342 U.S. 830 (1951).

5. The Proceedings Below

On October 25, 1965, appellants commenced this action, alleging that, by failing to make findings based upon the individual circumstances concerning the eligibility of the C(6) firemen for unemployment benefits, the Board was violating the mandatory procedural provisions of its governing statute and thereby acting in excess of its statutory jurisdiction (R. 1-31). Appellants prayed for a declaration concerning the unlawfulness of the payments made and being made to the C(6) firemen, and for preliminary and permanent injunctions against any further payments (R. 27-30).

On November 23, 1965, the District Court filed its "Memorandum of Decision" (R. 138-146)* denying appellants' motion for a preliminary injunction. Though the court found that "substantial sums" were being paid out each week to the C(6) firemen (R. 141), it nevertheless declined to issue an injunction to preserve the status quo pending the final determination of the case. The court's ruling was based upon findings that the Board had acted within the limits of the "discretion vested in it by law" (R. 143) and that there was "no substantial possibility" that appellants would be able to establish that they had standing to review the actions of the Board (R. 144). At the time of the denial of the preliminary injunction, the unemployment benefits being paid to the C(6) firemen were on the order of $20,000 to $25,000 each week (R. 21, 227-28).

Believing that the findings and the decision of the District Court were in error appellants filed a timely notice of appeal (R. 148) and Appeal No. 20785 followed. At the same time, appellants renewed their motion for a preliminary injunction, presenting additional materials intended to show that the Board had not, in fact, exercised any discretion, statutory or otherwise,

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*The District Court's decision is reported at 248 F. Supp. 44 (N.D. Cal. 1965).

and that appellants had an obvious and justiciable interest in the unlawful waste of the Account (R. 188-201, 203-07). The renewed motion for a preliminary injunction, along with appellees' motions to dismiss or for summary judgment, were submitted for decision on April 22, 1966 (R. 262). As of that date, the unemployment benefits currently being paid out were on the order of $12,750 each week (R. 228).

No decision by the District Court was announced until July 10, 1966, over eleven weeks after the date of submission (R. 262). The court then issued its further "Memorandum of Decision" (R. 233-34) which denied, without further discussion, the renewed motion for a preliminary injunction "for the reasons set forth" in the earlier memorandum. Appellees' motion for summary judgment was granted, the court finding that the Board had acted within its discretion and that appellants had no standing to sue. Appellees were directed to prepare and submit findings, conclusions and a formal written judgment.

Appellees' proposed findings, conclusions, and judgment were promptly disapproved by appellants (R. 244, 263) who thereafter served and filed their proposed modifications (R. 235-41). The modifications were rejected, and appellees' drafts were signed by the District Court without substantial change on September 9, 1966 (R. 244-54). Judgment was entered on September 13, 1966, and Appeal No. 21377 followed (R. 263). Pursuant to stipulation of counsel and the November 2, 1966, order of this Court, the two appeals have been consolidated here for briefing and oral argument.

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred and abused its discretion in denying appellants' original motion for a preliminary injunction.

2. The District Court erred and abused its discretion in denying appellants' renewed motion for a preliminary injunction.

3. The District Court erred in granting appellees' motion for summary judgment, in dismissing appellants' action with prejudice, and in entering final judgment against appellants.

4. The District Court erred in finding that the C(6) firemen who accepted the severance allowance and thereafter applied for unemployment benefits "were unable to secure other employment." (R. 247) There is no evidence in the record to support this finding.

5. The District Court erred in finding that the Railroad Retirement Board (as opposed to Mr. Carter) made on June 5, 1964, a "general ruling" with respect to the eligibility of the C(6) firemen for unemployment benefits (R. 250), and in failing to find, as was proposed by appellants (R. 237), that neither the Board nor any of its employees ever even undertook to consider the individual facts and circumstances relating to the eligibility of any of the C(6) firemen for such benefits. The finding made is erroneous and the finding proposed is fully supported by the record. These matters lie at the heart of the case, and the refusal of the District Court to make proper findings concerning them necessarily undercuts the rationale of its decisions.

6. The District Court erred in finding that the issuance of a preliminary injunction would "adversely" affect the interests of the public and the C(6) firemen (R. 251). There is no evidence in the record to support this finding.

7. The District Court erred in finding that there was, in this action, "no genuine issue as to any material fact" (R. 234) and in concluding that summary judgment was therefore appropriate (R. 234, 254). Upon the view of the case taken by the District Court—that the conduct of the Board was shielded from judicial review by the doctrine of administrative discretion—a principal factual issue was whether the Board had properly and deliberately exercised its discretion. In view of the conflicting evidence

and contentions of the parties, the court should have ordered a trial of this issue on the merits. Instead, it improperly resolved the conflict in favor of appellees and entered summary judgment against appellants.

8. The District Court erred in concluding that appellees had acted "within the limits of discretion vested in them by law." (R. 252) The Board had no "discretion" to ignore the mandatory procedural provisions of its governing statute as it did when it failed to make specific findings of eligibility in cases where eligibility necessarily turned upon the factual circumstances of each individual case. Nor had it "discretion" to misconstrue the substantive provisions of the Act in a manner contrary to its language and its manifest purpose.

QUESTIONS PRESENTED

1. Can it be determined, as a matter of law, and without any investigation of the individual circumstances, that of the more than 3,000 C(6) firemen who elected to reject comparable jobs, accept the severance allowance, and thereby forfeit all of their seniority rights and relations, no single fireman could possibly have been found to have "left work voluntarily" without "good cause"?

2. Can it be determined, as a matter of law, and without any investigation of the individual circumstances, that of the more than 3,000 "comparable jobs" offered to such firemen, no single job could have constituted "suitable work" which might have been rejected "without good cause"?

3. Is the Board free to ignore the provisions of its governing statute directing it "to make findings of fact" with respect to eligibility for benefits in situations where eligibility necessarily depends upon the facts and circumstances of each particular case?

4. Do appellants have standing to complain of the unlawful waste by appellees of the funds in the Account, when appellants represent the carriers contributing more than eighty-five percent

of all funds paid into the Account, when the Account, during the last fifteen years, has wasted away by an amount in excess of one billion dollars while appellants' contribution rates have been repeatedly increased to make up the deficit, and when, if appellants have no standing to complain, the unlawful acts of appellees can never be reviewed at all?

5. Is the conduct of the Board wholly immune from judicial review in circumstances where the Board chooses to violate the mandatory procedural provisions of its governing statute and to act in excess of its statutory jurisdiction?

6. Was summary judgment proper when, in the view of the case taken by the District Court, a dispositive question was whether the Board had acted within its "discretion" and when the material facts at issue included matters crucial to the determination of that question?

SUMMARY OF ARGUMENT

1. The Payment of the Unemployment Benefits to the C(6) Firemen Was Contrary to Statute and in Excess of the Jurisdiction of the Board.

Section 4(a-2) of the Act provides that a man is disqualified for unemployment benefits if he "left work voluntarily" without "good cause," or if he "failed, without good cause, to accept suitable work." Sections 4(a-2) and 5(b) of the Act expressly require the Board, prior to the payment of unemployment benefits, to make "findings of fact" with respect to each of these matters.

It is undisputed that each of the C(6) firemen elected, of his own free choice, to terminate his employment with the railroads, and that most of those firemen, in connection with their decisions, rejected comparable jobs which might clearly have constituted suitable work. It is also undisputed that, despite the command of the statute, the Board, in determining the C(6) firemen eligible for unemployment benefits, never even undertook to determine,

upon the basis of the individual facts, whether any of the firemen, in voluntarily leaving work and in rejecting the comparable jobs, had acted without "good cause" and were thereby disqualified under the provisions of the Act. It therefore follows that the payment of the benefits to the C(6) firemen was and is contrary to statute and in excess of the statutory jurisdiction of the Board.

Appellees now attempt to justify their conduct by urging two quite startling interpretations of the statute which supposedly eliminate all disqualification problems under Section 4(a-2): that "work," within the meaning of the Act, refers not to the employment relationship, but rather to the specific duties upon which a man might from time to time be engaged; and that a desire to receive a severance allowance necessarily constitutes "good cause," in every case, for rejecting suitable work. These proffered interpretations of the statute are entitled to no weight here for at least three reasons: they formed no part of the administrative ruling pursuant to which the benefits in issue were paid and under which their legality must necessarily be determined; they are wholly at odds with the language and manifest purpose of the Act, and must therefore be rejected; and, even if correct, they would fail to dispose of the need to consider the individual circumstances which would still remain crucial to the eligibility of many of the C(6) firemen.

2. The District Court Had Power to Review, at the Instance of Appellants, the Unlawful Actions of the Board.

Appellees argue that, for a number of technical reasons, neither this nor any other court can ever review the actions of the Board or restrain it from proceeding in willful violation of the mandatory procedural provisions of the statute creating its power to act. Each of appellees' arguments, including those accepted by the District Court, is wholly without merit:

(a) *Standing.* The District Court, in concluding that appellants had no standing to challenge the unlawful diversion of the

Account, improperly analogized appellants and other employers under the Act to general federal taxpayers having no standing to challenge expenditures of the general federal revenues. Unlike such taxpayers, however, whose interest in the general federal Treasury is minute and indeterminable, appellants are members of a small and definite class who contribute to a specific account earmarked for a definite purpose. The decisions of the Supreme Court of the United States and of this Court make it unmistakably clear that in such circumstances standing necessarily exists.

(b) *Administrative Discretion.* The doctrine of administrative discretion did not, as the District Court apparently concluded, preclude review on the merits of the unlawful actions of the Board. The District Court's failure to exercise its own judgment concerning the meaning and effect of the statute was erroneous for at least three separate reasons: first, the court improperly assumed, in the presence of conflicting evidence, that the Board had deliberately exercised its discretion in a manner sufficient to invoke the doctrine of limited review of administrative acts and it improperly entered summary judgment against appellants upon that assumption in violation of the express condition of Rule 56 that summary judgment is proper only when "there is no genuine issue as to any material fact"; second, the court failed to perceive that, under established rules relating to review of administrative action, it was free to reject the Board's supposed interpretation of the substantive provisions of the statute if, as seems apparent, that interpretation was erroneous; and third, the court ignored the fact that there was and could be no room for an exercise of administrative discretion with respect to the duty of the Board to follow the mandatory procedural provisions of its governing statute.

(c) *Statutory Preclusion of Review.* The courts of the United States unquestionably have power to review agency action in all circumstances where review has not been prohibited by Congress. The provisions of the Act contain no general prohibition of

judicial review of the actions of the Board, but only (in Section 5) a particular procedure for administrative and judicial review in particular and selected circumstances not presently applicable. It is settled, however, that the fact that Congress has made provisions for review of particular matters neither compels nor suggests the conclusion that it has impliedly prohibited review as to all other matters. It is also settled that where, as here, an agency has ignored the command of its governing statute and proceeded in excess of its statutory jurisdiction, an intent by Congress to preclude judicial review cannot and will not be assumed.

(d) *Sovereign Immunity.* Where, as here, officers of the United States have acted beyond their statutory powers, it is perfectly clear that an action to enjoin such conduct cannot be barred by the doctrine of sovereign immunity.

(e) *The C(6) Firemen as Indispensable Parties.* This action will in no way determine the eligibility for unemployment benefits of any one of the C(6) firemen. The action rather will establish only that the Board, in determining the matter of eligibility, must follow the mandatory procedural provisions of the statute. The firemen are plainly not indispensable parties to such a determination when, as is apparent, they will retain the right, in connection with their claims, to make whatever contentions they choose, excepting only the contention that the Board may determine their eligibility without prior compliance with the procedures established by the Act. This conclusion is strongly reinforced by the fact that there is no means by which jurisdiction over the firemen could ever be obtained and that, if they were held indispensable, no remedy could ever be granted to the present parties by any court. The rule relating to indispensability is a practical one, intended to further rather than to frustrate justice, and it will not be applied in such circumstances.

3. Appellants Were and Are Entitled to the Declaratory and Injunctive Relief Sought by Them in the District Court.

In permitting the payment of the unemployment benefits to the C(6) firemen without investigation of the individual facts which were crucial to the question of eligibility, the Board proceeded in violation of the statute and in excess of its statutory jurisdiction. Appellants were therefore entitled to the declaratory relief sought by them in the District Court. Since, however, the Board's violation of the statute is clear from the record, this Court need not remand for further proceedings but may itself grant appellants the declaratory relief to which they are entitled.

Upon the basis of the showing made by them in the District Court, appellants were clearly entitled to a preliminary injunction preserving the status quo pending the litigation. In denying preliminary relief upon the assumption that the Board had acted within its discretion and that appellants had no standing to sue, the District Court not only was mistaken upon the merits; it also failed to heed the rule of this Circuit that a court must entertain a motion for preliminary relief if there is a possibility that the plaintiff may make out a case upon the merits. The orders of the District Court denying the preliminary injunction should therefore be reversed, and the case should be remanded with directions that the District Court enter its permanent injunction forbidding the payment of any further benefits to the C(6) firemen unless and until the Board complies with the provisions of the statute requiring it to make factual determinations concerning the matter of eligibility.

ARGUMENT

1. In Determining, Without Any Consideration Whatever of the Individual Circumstances, That No C(6) Firemen Could Possibly Be Disqualified for Unemployment Benefits Under Section 4(a-2) of the Act, the Board Proceeded in Direct Contravention of Its Governing Statute and in Excess of Its Statutory Jurisdiction.

The record plainly discloses that the Board failed to perform its mandatory duty under the statute to make findings, based upon

the individual circumstances, concerning the eligibility of the C(6) firemen for unemployment benefits (R. 10-12, 16-17, 91-92, 199-200). Appellees argue (R. 142), and even induced the District Court to conclude, that:

> "The statute does not require the Board to make individual findings of fact when the right to benefits of claimants in a particular category can be determined by one finding applicable to all members of that category." (R. 252)

The argument and the conclusion are unassailable, but in the light of the present facts are wholly beside the point; for as will be seen below, the blanket rulings of the Carter memorandum did not relate to matters applicable to all C(6) firemen. Instead, they wholly ignored distinctions which were crucial to the question of eligibility and which depended almost entirely upon the individual circumstances.

A. THE BOARD FAILED TO DETERMINE, AS THE STATUTE REQUIRED, WHICH OF THE MORE THAN 3,000 C(6) FIREMEN WHO ELECTED TO REJECT COMPARABLE JOBS, TO FORFEIT THEIR EMPLOYMENT AND SENIORITY RIGHTS AND RELATIONS, AND TO ACCEPT IN LIEU THEREOF THE SEVERANCE ALLOWANCE, THEREBY "LEFT WORK VOLUNTARILY" WITHOUT "GOOD CAUSE."

The disqualification provisions of the Act provide that a man is ineligible for unemployment benefits if the Board "finds that he left work voluntarily" without "good cause." Section 4(a-2) (i). This language necessarily implies that, with respect to every application for benefits, the Board *must* make some reasonable effort to determine whether a man's leaving of work was voluntary, and if it was, whether he had good cause for doing what he did. This implication is made explicit in Section 5(b), which provides:

> "The Board is *authorized and directed* to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits." (Emphasis added.)

The legislative history is equally clear. See, *e.g.,* H.R. Report No. 748, 88th Congress, 1st Session, page 11 (1963):

> "Section 4(a-2)(i) as amended by the bill, would broaden the scope of this section to lengthen the disqualification period. As amended, *this section would require investigation of any claim disclosing a possible voluntary leaving of work either with or without good cause* unless the disqualification period had been terminated as above described." (Emphasis added.)

Under the terms of the Award, the C(6) firemen were given a choice of staying on with the railroads in comparable jobs, with retention of all seniority rights and guaranteed annual earnings for five years, or of rejecting the comparable jobs and taking severance allowances averaging $5,600 (R. 9, 31 i-k; App. A, pp. 1-2). There can be no doubt that the action of those firemen who decided to give up work with the railroads in return for the severance allowance was "voluntary" in whatever sense that word, as used in the statute, might conceivably be construed; for it is apparent that the choice to leave or to stay was theirs alone. Nor is there doubt that each of these men had, of his own free choice, "left work" with the railroads. The language of the Award makes this conclusion unmistakably clear, for Paragraph C(6) repeatedly provides that a fireman who elected to take the severance allowance would thereby "terminate" and "forfeit" "all of his employment and seniority rights and relations" (R. 31 i-k; App. A, pp. 1-2). Since each of the C(6) firemen, therefore, had clearly "left work voluntarily," it remained for the Board to determine, on the basis of the individual circumstances, which of those firemen applying for unemployment benefits had left work "with good cause" and would therefore nevertheless qualify. It may be assumed that some, perhaps many, of these firemen might have had good cause for leaving work: a particular comparable job might have been unsuitable, an undesirable move might have been

involved, and so on. But it also seems apparent that as to many of these men, a decision to leave could not possibly have been based upon good cause. We cannot, of course, know—in the absence of specific findings by the Board—how many of the firemen fell into each of these categories. But the conclusion is inescapable that it was the mandatory duty of the Board to explore the individual circumstances prior to the payment of unemployment benefits to the C(6) firemen; and it is admitted that this statutory duty was not performed.

How do appellees now answer the charge that the Board failed to perform its statutory duty? With a trick definition of the word "work" as used in the disqualification provisions of the Act. According to appellees, the word "work" does not refer to work for a railroad employer—to a man's general employment relationship—but to the specific duties upon which he may, at one time or another, be engaged (R. 92, 127-28, 223). Since the award hypothesizes the elimination of the *existing job* of each C(6) fireman to whom it applies, it follows (so the argument runs) that no C(6) fireman can be held to have left "work" (*i.e.,* his existing job) "voluntarily," even though he admittedly chose to give up his work with the railroad. This being so, appellees argue, none of the C(6) firemen can possibly fall within the disqualification provisions of Section 4(a-2)(i), and there was therefore no occasion for the Board to determine whether any of the firemen left work "with good cause" (R. 91-92, 127-28).

Appellants submit that appellees' present position and the definition of the word "work" upon which it is based are wholly at odds with the manifest purpose of the Act. At the risk of an elaboration of the obvious, it must be apparent that the purpose of the Railroad Unemployment Insurance System is to afford a means of subsistence and support to those railroad workers who have been, but are no longer, employed. Yet unemployment benefits cost money, and no legitimate social purpose would be served by pay-

ing such benefits to individuals able, but unwilling, to accept employment reasonably suited to their abilities and circumstances. The Disqualifying Conditions, set out in Section 4 of the Act, therefore contain a carefully balanced and interrelated series of provisions under which the legitimate needs of the railroad workmen are weighed against the social and economic imperative that benefits must not be paid where they are either redundant or not reasonably and legitimately required. Thus, Section 4(a-1)(i) contains a disqualification for fraudulent claims; Section 4(a-1)(ii) is intended to eliminate certain duplications of benefits; and Section 4(a-2)(iii) prohibits the payment of benefits to men on strike in violation of the National Labor Relations Act or of the rules of their own unions. Subsections 4(a-2)(i), (ii), the provisions presently involved, deal with the problem of the man who is unemployed through his own choice. The tentative disqualifications of men who have "left work voluntarily," or who have failed to accept "suitable work" recognize that voluntary unemployment should not be encouraged, and that the system should not be charged with its costs. Yet these considerations are to be balanced against the probability that, in at least some cases, a man's choice not to stay on with his employer might be a reasonable one, and his decision to leave might be essential to his dignity, his safety, or the well-being of his family. Thus, and even though his decision is voluntary, a man is not disqualified if he left or failed to accept suitable work with "good cause."*

Surely, any fair analysis of this statutory scheme compels the conclusion that when Congress used the words "left work voluntarily" in the provisions of Section 4(a-2)(i), it had in mind the general subject of the man's employment relationship with the

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*See also, Section 1(k) of the Act, which, as a measure complementary to the Disqualifying Conditions of Section 4 (a-2), includes, as compensable days of unemployment, only such days upon which a man "is able to work and is available for work."

railroad, and not the specific duties upon which he might from time to time be engaged. See the Hearings before the Senate Committee on Interstate Commerce, 75th Congress, 3rd Session (1938), the committee which was then considering the provisions of the Act prior to its enactment into law. In these hearings, the terms "work" and "employment" were often used interchangeably, clearly implying that the term "work" was used in the Act in its ordinary and normal sense—that of work as a railroad employee.*

This is not, of course, to say that a man's specific duties at a given time could not afford a proper basis for leaving work; if there were something unreasonable or distasteful about those duties, a decision to leave work might be made with "good cause" and disqualification would not then ensue. But, as opposed to the words "good cause," the words "left work voluntarily" necessarily focus upon the question whether the man has freely chosen to

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*See *e.g.*, pages 118-19 of the Hearings:

"MR. HAY. [Section 1(k) of the Act provides]:

Subject to the provisions of section 4 of this act, a day of unemployment, with respect to any employee, means a calendar day on which he is able to work and is available for work.

That would mean that a man would have to stand ready and willing to work. Of course, that is read in connection with Section 4.

Section 4 provides . . . that upon once leaving *employment* voluntarily, without good cause, he shall not then be entitled to unemployment benefits for a period of 30 days. . . .

THE CHAIRMAN (interposing). Suppose he does voluntarily retire and says, 'I am not going to work.' Before he is entitled to any benefits should he not go to work or show his intention to work as a *railroad employee,* because a man might voluntarily retire and then come in and get the benefits?

MR. HAY. I think, from reading that provision [Section 4] in connection with the provisions on page 5 which I read a minute ago [Section 1(k)], he would not be able to count it as a day of unemployment, because he would not be available for work." (Emphasis added.)

Compare also the obvious generality of the word "work" as used in the phrase "available for work" (Section 1(k)) and in the amplifying regulations (20 C.F.R. § 327 (1966)).

terminate his employment relationship rather than upon the factual basis for that choice, or whether the choice was justifiable.*

Not only is this interpretation of the statute most clearly in accord with the policy of the Act; it is also that which is most consistent with the obvious intent of the arbitration award. Under the terms of the Award, the C(6) firemen were given a choice—to stay on in a comparable job, or to terminate their employment relationship. If they elected to terminate their employment, they were to receive a substantial severance allowance—an allowance explicitly based upon their earnings during the preceding twelve-month period. What conceivable purpose could the severance allowance have had except to tide the men over until they were able to find other employment? But such, of course, is the precise function of the unemployment benefits. Indeed, appellees admit that this is so (R. 80). If a man can receive unemployment benefits in addition to the severance allowance, he is obviously being reimbursed twice for but a single loss.† There is no occasion to construe the statute in a fashion which would bring about such a bizarre result. According to its literal and common-sense meaning, the phrase "left work voluntarily" refers simply to a voluntary decision to leave the service of one's employer. Such a decision, of course, was made by every single one of the more than 3,000 C(6) firemen.

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*It is possible that appellees may attempt to rely upon their own Regional Operating Manual, which carefully defines "work" in a manner supposedly consistent with their present position (Section 1504.02) and which even goes on to attempt to deal with the precise situation of a resignation to take a severance allowance (Section 1504.03g) (R. 225). The difficulty, of course, is that the present version of the manual was first issued on May 1, 1965, long after this controversy had arisen (R. 197-98, 224-25), and is obviously only a *post litem motam* product. Moreover, as is pointed out in the affidavit of Mr. Healy, a member of the Board, the Board's prior practice, as well as its present practice with respect to all employees other than C(6) firemen, is to construe the word "work" as referring simply to "services for hire." (R. 196-99)

†Compare Section 4(a-1) (ii) of the Act which expressly prohibits the payment of unemployment benefits duplicating social insurance payments receivable under any other law.

Moreover, and even under appellees' interpretation of the statute, it is perfectly clear that at least some of the C(6) firemen "left work voluntarily." It will be recalled that, under the terms of the Award, the comparable jobs to be offered included, among others, those of "engineer, fireman (helper), brakeman or clerk." (R. 31 i-j; App. A, p. 1) Thus the Award contemplated that, though a fireman could be offered a different job, he might also be offered the *same* job—that of a fireman—although admittedly in connection with a different engine crew.* To say that the shift of a man from one fireman job to another would result in the elimination of his "work," within the meaning of the statute, would be to pursue technicalities to their drily logical extreme. It appears that even the Board is not prepared to go so far, for in the provisions of its current Regional Operating Manual, expressly intended to cover a resignation to take a severance allowance, the Board has ruled:

> "Section 1504.03g. *Resignation to take severance allowance.* An employee's resignation to take a severance allowance constitutes voluntary leaving of work if provisions of the agreement or plan under which the severance allowance is paid are such that the employee could have continued working for his employer in his same occupation and at the same location, with prospects for future employment not substantially diminished. Otherwise, his resignation to take the severance allowance does not constitute a voluntary leaving of work." (R. 225)

Thus, according to the Board's own regulations, a C(6) fireman offered another fireman's job at the same location would have left work voluntarily if he had elected to reject that job and to accept the severance allowance. Yet, it is admitted that the Board made no investigation whatever to determine which of the C(6) firemen

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*Under the terms of the award, 10% of the fireman jobs would be retained, even on those crews which were to be affected by it; and, of course, there were many fireman jobs—for example, those upon passenger trains—which were wholly unaffected by the Award (R. 31e-g).

had been offered such jobs, and which of them had rejected such jobs without "good cause." (R. 91-92)

But that is not the end of the matter. Although most of the C(6) firemen waited until their jobs had been eliminated in order to accept the severance allowance and terminate their employment, it is alleged in the verified complaint, and is undisputed by appellees, that, of the C(6) firemen, "some had elected to quit their jobs and receive their severance pay even before said comparable jobs had become available for offer to them under the terms of said award . . . ." (R. 16) The Award, however, expressly provides that the C(6) firemen should retain their engine service assignments "unless and until offered by the carrier another comparable job." (R. 31 i-j; App. A, p. 1) Thus, there can be no doubt whatever that at the time these particular men quit, their own jobs still existed. It therefore necessarily follows that they "left work voluntarily" even if, as appellees contend, the word "work" refers to the particular job held at the time of termination of employment rather than to the employment relationship itself.

B. THE BOARD FAILED TO DETERMINE, AS THE STATUTE REQUIRED, WHICH OF THE MORE THAN 3,000 C(6) FIREMEN WHO REJECTED OFFERS OF "COMPARABLE JOBS" THEREBY "FAILED WITHOUT GOOD CAUSE TO ACCEPT SUITABLE WORK AVAILABLE . . . AND OFFERED TO [THEM]."

Under the provisions of the Act, a man is temporarily disqualified from unemployment benefits if "the Board finds that he failed, without good cause, to accept suitable work available . . . and offered to him . . . ." Section 4(a-2)(ii). Under the Award, a C(6) fireman was to retain his existing position "unless and until offered by the carrier another comparable job." (R. 31 i-j; App. A, p. 1) With the exception of those men who terminated their employment and took the severance allowance even before a comparable job was offered to them, all of the C(6) firemen covered by the Award were offered and refused comparable jobs "such as, but not limited to, engineer, fireman (helper), brakeman,

or clerk." (R. 16, 31 i-j) Under the provisions of the Act, it was plainly the duty of the Board to determine which of the C(6) firemen had refused such comparable jobs; which of those comparable jobs constituted suitable work within the meaning of the statute; and as to those men who had failed to accept such suitable work, which of them had acted "without good cause." The Carter memorandum, however, purported to make all of this unnecessary by determining that none of the comparable jobs could possibly constitute suitable work:

> "A fireman confronted with this choice who chooses separation from service is not to be regarded as having failed to accept suitable work within the meaning of Section 4(a-2)(ii) of the Act." (R. 31 w)

This ruling was palpably erroneous. How could it conceivably be assumed that no single one of the more than 3,000 comparable jobs offered to the C(6) firemen could possibly constitute "suitable work" within the meaning of the statute? Under the terms of the Award, some of the jobs which might be offered—those as firemen—were precisely the same as those eliminated. Others—those of engineers—might even have been considered preferable. In handing down this particular ruling, Mr. Carter had obviously gone too far; and counsel for appellees have ever since been engaged in an effort to re-write history in order to make Mr. Carter's mistake more palatable. Appellees now say that Mr. Carter determined, not that none of the comparable jobs could constitute suitable work, but that none of them could possibly have been rejected "without good cause." See, *e.g.*, the November 9, 1965 "Summary of Defendants' Arguments":

> "The Board ruled that the election to take severance pay rather than another job was not a refusal of suitable work *without just cause.* The Board ruled that the Award gave the firemen, upon losing their jobs, a free election—and that if they elected to take severance pay, this was not a refusal of suitable work without just cause. Hence, whether the job was

> suitable in any given instance was immaterial, since the good cause was present in every case." (R. 79) (Emphasis in original.)

But Mr. Carter said nothing whatever in his memorandum about either "just cause" or about a "free election." His ruling was that the C(6) firemen could not, under any circumstances, "be regarded as having failed to accept suitable work within the meaning of Section 4(a-2)(ii) of the Act." (R. 31 w) No one will ever know whether the rationale now put forward by counsel for appellees ever occurred to Mr. Carter, either before or after the promulgation of his memorandum. Since all of the benefits paid to the C(6) firemen were paid upon the basis of the instructions in the Carter memorandum, however (R. 16-17, 91-92, 199-200), the validity of those payments must be sustained, if at all, upon the reasoning of that memorandum and not upon some theory invented by counsel subsequent to the event. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-69 (1962), so holds:

> "The Commission must exercise its discretion under § 207(a) within the bounds expressed by the standard of 'public convenience and necessity.' . . . And for the courts to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' . . .
>
> Commission counsel now attempt to justify the Commission's 'choice' of remedy on the ground that a cease-and-desist order would have been ineffective. The short answer to this attempted justification is that the Commission did not so find. *Securities & Exchange Comm'n. v. Chenery Corp.*, 332 U.S. 194, 196. The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . . ."

But even if Mr. Carter had, in fact, made a considered determination that any C(6) fireman would have "good cause" to reject any comparable job, such a determination would plainly have been insupportable under the terms of the statute. The whole point of the disqualification provisions of Section 4(a-2) is that unemployment benefits must not be paid to men who are unwilling to work at jobs reasonably suited to their needs and abilities. Compare the provisions of Section 1(k) of the Act, which deny benefits unless a man "is able to work and is available for work." The Board cannot be permitted to emaciate the statute by attributing a meaning to the words "good cause" which could not conceivably have been contemplated by the Congress. Indeed, the *reductio ad absurdum* of the Board's present position is found in a further consideration of the application of the statute. Suppose, for example, a C(6) fireman were offered a "comparable job," as say, an engineer, and were held to have refused that job with "good cause." Suppose that, after receiving his severance allowance, the fireman were again offered the same job. There seems little doubt that the engineer's job might constitute suitable work within the meaning of the statute. But, in order to be consistent with its prior ruling, the Board must necessarily determine that a refusal of that job would have been with good cause; for except for the fact that the severance allowance had changed hands, there would be nothing about either the job or the man's personal circumstances which had changed. Yet, even the Board is apparently not prepared to go this far; for Mr. Myles F. Gibbons, its General Counsel, has stated that in such a case it would be necessary "to determine, upon consideration of all the circumstances, whether the rejection was a refusal of suitable work without good cause, or indicated a lack of availability for work on the part of the claimant." (R. 135d) Appellees' argument is therefore necessarily reduced to the proposition that a desire to receive a severance allowance averaging $5,600, must, in every case, constitute "good

cause," within the meaning of the statute, for the refusal of a job which was otherwise suitable in all respects.

Appellees seek to support this startling application of the statute by arguing that the Award gave to the C(6) firemen a "free choice" to stay on or to leave (R. 127), and that there was nothing "reprehensible from the social insurance standpoint" about the exercise of that choice (R. 92). The argument misses the mark entirely. The issue here is not whether the C(6) firemen had a right to reject the comparable jobs and to accept the severance allowances; indisputably they did. Nor is the question whether such decisions were or were not "reprehensible" in whatever sense appellees use that term; for the disqualification provisions in the Act have nothing to do with moral rectitude.* The issue here is whether, having decided to take the money and to terminate their employment with the railroads, the C(6) firemen were nevertheless entitled to receive unemployment benefits. This question must be determined upon the basis of the application of the statute to the particular situations of each of the men involved; and the determination whether a particular man had good cause to reject a comparable job plainly must depend, not upon the existence of an available windfall, but upon the nature of the job and the personal circumstances of the man who rejected it. It is admitted that the Board did not explore these matters in the case of any single one of the more than 3,000 C(6) firemen (R. 91-92).

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*See the September 13, 1963, letter of the Honorable W. Willard Wirtz, Secretary of Labor, to the Honorable Lister Hill, Chairman, Committee on Labor and Public Welfare, commenting upon the disqualification provisions of the Act:

> "[T]he unemployment insurance disqualification is not intended as a punishment for a wrongful act, but is merely a device for limiting the insured risk to exclude employment brought about by a voluntary action taken by the claimant without good cause. This principle is generally accepted, even when the disqualification is more severe than we recommend, and is accompanied by the concept that benefits should not be paid on the basis of work which the individual could have kept but for his own action taken without good cause." S. Rep. No. 510, 88th Cong., 1st Sess. 31 (1963).

II. The District Court Was in Error in Concluding That It Was Without Power to Review, at the Instance of Appellants, the Unlawful Actions of the Board.

Appellees' primary energies in the proceedings below were not directed to a defense, on the merits, of the failure of the Board to follow the procedural provisions of the statute. Instead, appellees vigorously urged a variety of technical reasons why, in their view, the District Court was without power to review the Board's actions. Thus, appellees argued that: (i) appellants were without standing to obtain judicial review of the actions of the Board; (ii) the actions of the Board are shielded from judicial review by the doctrine of administrative discretion; (iii) judicial review, at the instance of appellants, of the actions of the Board is precluded by Section 5 of the Act; (iv) this action constitutes an unconsented suit against the United States; and (v) the C(6) firemen were indispensable parties who had not been and could not be joined as defendants (R. 104, 209).

Though the District Court's two opinions and its findings and conclusions may not be entirely clear upon the matter, it appears that the sovereign immunity and indispensable parties arguments were rejected, and that the decisions were based principally, if not exclusively, upon a determination that appellants had no standing to sue and that the doctrine of administrative discretion shielded the Board's actions from judicial review (R. 143-46, 233-34, 251-52).*

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*The District Court also concluded that the Act, while providing for judicial review of some Board actions, did not authorize review of the actions challenged here—the allowance of claims for benefits in circumstances where the employment relationship was not denied (R. 143-44, 252). Since an inherent right of judicial review nevertheless exists in the absence of express statutory authorization (see Part II C, *infra*) this conclusion does not, of course, dispose of the jurisdictional question raised by appellees. It also appears that the District Court may have confused the quite separate questions whether appellants have standing to sue and whether this particular action is precluded by the statute (R. 143-44).

Since, without doubt, all of the technical arguments made by appellees in the District Court will be reasserted here, they will all be considered in this section of appellants' brief: first, those arguments which the District Court apparently found appealing, and then the rest.

A. APPELLANTS, WHO REPRESENT ALL OF THE CLASS CONTRIBUTING MORE THAN EIGHTY-FIVE PERCENT OF ALL FUNDS PAID INTO THE RAILROAD UNEMPLOYMENT INSURANCE ACCOUNT BY THE CARRIERS, CLEARLY HAVE STANDING TO CHALLENGE THE UNLAWFUL WASTE BY APPELLEES OF MORE THAN $2,500,000 OF THOSE FUNDS.

It is undisputed that:

(i) Appellees have already paid unemployment benefits to C(6) firemen in amounts substantially in excess of $2,500,000 and threaten to and will, unless enjoined, continue to make such payments in the future (R. 18, 199-200, 228);

(ii) Substantially all contributions to the Unemployment Insurance Account are made by employers and no such payments are made by employees. Section 8(a), (g). For this reason, substantially all sums paid by appellees to the C(6) firemen as unemployment benefits have been contributed by employers subject to the Act and substantially all payments made in the future to such firemen will be replaced by contributions by such employers (R. 200);

(iii) Since 1950 the Account has wasted away from a surplus of approximately $780,000,000 to a deficit of approximately $290,000,000 (R. 85) while the statutory rate of contributions required of employers has steadily and irreversibly increased to the present all-time high of four percent (Section 8(a));

(iv) Appellants represent a class including over 775 railroads which operate more than ninety-five percent of the total railroad mileage in the United States and which presently contribute more than eighty-five percent of all funds paid into the Railroad Unemployment Insurance Account by the carriers (R. 2-3, 188); and

(v) If appellants have no standing to invoke judicial review of the Board's unlawful conduct, no one has, and the interests of the railroads, the railroad employees, and the public in the proper enforcement of the statute and the integrity of the Account must remain wholly unprotected (R. 200-01).

Appellees say, however, that the injury to appellants from the unlawful waste of the Account is too remote to afford them standing to sue. Appellees argue that because the Account is now hundreds of millions in the red, because, under present rates of contributions and expenditures, that deficit may not be converted into a substantial surplus for many years, and because the present statute provides for a reduction in rates only when the surplus in the Account exceeds $300,000,000, appellants cannot until that time (estimated by appellees at thirty-five years from the present) "suffer any conceivable injury" by reason of appellees' unlawful waste of the funds in the Account (R. 77).*

This argument, however ignores the fact that it is in part because of appellees' waste of the funds in the Account in the past that the deficit and the contribution rate have inexorably increased; that it will be in part because of appellees' waste of the funds now and in the future that the deficit, if reduced at all under present contribution rates, will be reduced by almost imperceptible degrees; and finally, and most important, that unless

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*Appellees' estimates of the ebb and flow of the Account are necessarily suspect, for they have not been notably accurate in the past. The Board's present prediction that it will be thirty-five years before the contribution rate can be reduced is based upon the forecasts of its actuaries that the deficit in the Account will diminish at the rate of approximately $17,000,000 each year (R. 77, 86). In November of 1950, when the Account had a surplus of $779,067,958.79, the Director of Research of the Board, in connection with other litigation then pending, estimated that, until sometime after September of 1962, the Account would continue to have a surplus above $450,000,000. (November 1, 1950, affidavit of Walter Matscheck, set forth in full in Transcript of Record, p. 39, Railway Express Agency, Inc. v. Kennedy, 342 U.S. 830 (1951)). In fact, and by June 30, 1962, the surplus in the Account had disappeared entirely, and a deficit of more than $280,000,000 already existed (R. 85).

appellees are restrained from these and other diversions of the Account, it is probable that the contribution rate will be increased again and again in the future as it has been repeatedly increased in the past. See the affidavit of Mr. Healy, a member of the Railroad Retirement Board, who is a man in a position to know:

> "For these reasons, the improper payments already made and presently being made to the C(6) firemen could result, not only in a postponement of the date upon which the rate of contributions under the Act can be decreased but may well result in an actual increase in the contribution rates necessary to defray these and other depredations upon the Account." (R. 200)

In determining that appellants had no standing to challenge the diversion of the fund to which they, almost alone, contribute, the District Court apparently relied primarily upon the decision of the Court of Appeals for the Seventh Circuit in *Railway Express Agency, Inc. v. Kennedy,* 189 F.2d 801 (7th Cir. 1951), *cert. denied,* 342 U.S. 830 (1951) (R. 144-45). The *Kennedy* case involved a suit by Railway Express against the members of the Railroad Retirement Board seeking a declaration that certain unemployment benefits paid by the Board were contrary to the provisions of the statute. The District Court dismissed the complaint and the Court of Appeals affirmed, holding, with respect to the standing issue: (i) that the contributions of the plaintiff in *Kennedy* were merely "a type of tax" and that, as a federal taxpayer, plaintiff therefore had no standing to sue, and (ii) that the injury of which the plaintiff complained was "only a future possibility," since, under the circumstances then existing, the alleged unlawful expenditures could not affect the contribution rate for "the current years." 189 F.2d at 804-05.

Appellants respectfully submit that the *Kennedy* court was clearly wrong, even on the facts before it; and that, in any event, the reasoning of *Kennedy* cannot properly be extended to facts before this Court.

In determining that the plaintiff in *Kennedy* was simply a federal taxpayer having no standing to challenge the diversion of federal funds, the *Kennedy* court relied upon, but plainly misunderstood, the decision of the Supreme Court of the United States in *Massachusetts v. Mellon,* 262 U.S. 447 (1923). That case, it will be recalled, involved the standing of a general federal taxpayer to challenge an expenditure of the general revenues of the United States. The Supreme Court, in holding such a taxpayer to be without standing, stressed the fact that his interest was no different from that of all other taxpayers contributing to the general revenues—in the words of the Court, his "interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others." 262 U.S. at 487. Such was quite plainly not the case, however, with respect to employers such as the plaintiff in *Kennedy,* who contributed to the Railroad Unemployment Insurance Account. Those employers, unlike all other taxpayers, were contributors to a particular and specific account earmarked, not for expenditure as a part of general revenues of the United States, but for the payment of unemployment benefits to their own employees. In such circumstances, it is now and has always been the rule that the doctrine of *Massachusetts v. Mellon* can have no application. Compare *United States v. Butler,* 297 U.S. 1 (1935), a decision which involved the legality of a tax upon processors of commodities, with the resulting revenues to be used for the benefit, among others, of agricultural producers. The Supreme Court in *Butler* found *Massachusetts v. Mellon* clearly distinguishable, holding:

> "It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote

the expropriation of money from one group for the benefit of another." 292 U.S. at 61.

Indeed, and upon the precise issue presented in *Kennedy, Stark v. Wickard,* 321 U.S. 288 (1944), is directly in point; for there the Supreme Court expressly held that milk producers compelled by law to make contributions, by way of deductions, to a fund maintained by the Secretary of Agriculture had standing to challenge the illegal diversion of the fund. As the Court pointed out, "It is because every dollar of deduction comes from the producer that he may challenge the use of the fund." 321 U.S. at 308. In assuming that the employers, who were virtually the only persons contributing to the Account, had no greater interest in the waste of the Account than general federal taxpayers who contributed to it not at all, the *Kennedy* court simply assumed its conclusion—a conclusion which wholly distorts the meaning of the decision upon which it relied, and which flies in the face of other decisions of the Supreme Court directed to the precise point at issue.

Even if, however, employers contributing to an unemployment account could fairly be analogized to general federal taxpayers, any reliance upon *Massachusetts v. Mellon* would fail for still an additional reason: unlike general federal taxpayers, who share with millions of others their minute interest in the expenditure of the general federal revenues, employers under the Act comprise a small and limited class whose interest in the fund to which they contribute is markedly different both in nature and in magnitude. This distinction, which escaped the *Kennedy* court, was expressly recognized by the Supreme Court in *Massachusetts v. Mellon;* for while holding that the interest of the many millions of general federal taxpayers was too "minute and indeterminable" to be judicially cognizable (262 U.S. at 487), the Court nevertheless recognized and approved its own decisions holding that where

the number of taxpayers is far smaller—as for example in the case of the taxpayers of a municipality—the interest of such taxpayers is "direct and immediate" (262 U.S. at 486), and standing therefore exists. See also *Coleman v. Miller,* 307 U.S. 433, 445-46 (1939), where the Court, in distinguishing *Massachusetts v. Mellon,* reiterated its holdings that those taxpayers—municipal and State—who pay taxes into funds more limited than that of the general federal Treasury have standing to challenge the improper expenditure of those funds.*

Indeed, this Court itself has recognized that in situations involving challenges by State, municipal, or federal taxpayers of the validity of the acts of State or territorial officials, standing clearly exists—and precisely for the reason that, since the number of such taxpayers is smaller than the number of all general federal taxpayers, the interest of each is larger and is therefore judicially cognizable. See the decision of this Court in *Reynolds v. Wade,* 249 F.2d 73, 76 (9th Cir. 1957):

> "The principle announced in Commonwealth of Massachusetts (Frothingham) v. Mellon has no application to the instant case; here, a justiciable controversy is present. The basis of the Mellon doctrine lies in the infinitestimal relationship between the Federal taxpayer and the Federal treasury. When we compare the interest of a Federal taxpayer, who is one of over one hundred and sixty million, with the interest of an Alaskan taxpayer with a population of less than 130,000, the distinction, though one of degree, is obvious. The rationale of the cases allowing taxpayers' actions against municipalities is clearly applicable in the Alaskan situation."

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*Gange Lumber Co. v. Rowley, 326 U.S. 295 (1945), upon which the *Kennedy* court also relied, is not in point either there or here. In *Gange,* the total amount involved was only $460.50, and the Court therefore properly felt that any conceivable tax burden to a general taxpayer of the State of Washington by reason of that expenditure might well be "infinitesimal" (326 U.S. at 304). In *Kennedy,* as in the present case, the sums involved were substantial and the rule of *de minimis* applied in *Gange* is therefore plainly inapplicable.

See also, to the same effect, *Smith v. Virgin Islands,* 329 F.2d 131 (3d Cir. 1964).

Thus, the relevant distinction is not, as the *Kennedy* court believed it to be, between one who pays State and one who pays federal taxes; in both the *Reynolds* and *Smith* cases, the statutory levy in question was grounded upon federal law, as was the milk producers' deduction in *Stark v. Wickard.* The distinction is rather between the minute interest of a general federal taxpayer, one among many millions, in expenditures made from the federal Treasury, and the more significant interest of one among a far smaller group who contributes to a much more restricted fund. Though some cases might present difficulties in drawing the line, it is apparent that none are present here. A State, a territory, or even a municipality may have millions of taxpayers—the State of Alaska, as indicated in *Reynolds v. Wade,* had 130,000; but the railroads contributing more than eighty-five percent of all sums paid into the Account by carriers number only 775 (R. 2-3, 139, 188). Quite plainly, therefore, the principle of *Reynolds v. Wade* and *Stark v. Wickard,* rather than that of *Massachusetts v. Mellon,* is applicable here, and should have been applied in *Kennedy.*

Finally, the *Kennedy* court concluded, as appellees argue here, that, because it cannot be predicted with absolute certainty precisely when appellants will feel the bite of the Board's unlawful conduct, appellants' injury is therefore too remote and too uncertain to present a justiciable controversy. This argument plainly flies in the face of reality, for it cannot be disputed that substantially all funds paid and to be paid into the Account have been and will be paid by the employers, and that it is the employers who must bear the burden of any unlawful waste of the Account. The argument also flies in the face of the necessary implication of all those decisions of the Supreme Court and of this Court—including *Stark v. Wickard, Coleman v. Miller,* and *Reynolds v.*

Wade—which grant standing to taxpayers contributing to funds more limited than that of the general federal Treasury. For if, in order to obtain standing to challenge improper expenditure of municipal, State, or territorial revenues, such taxpayers must demonstrate precisely when and in what amount the injury will be felt by them in increased future taxes, it is apparent that they could never prevail. Indeed, the case of those who contribute to the Account is far stronger than those who contribute by way of State or municipal taxes. For while a State taxpayer may move, may die, or may otherwise escape the future tax burden resulting from the challenged expenditures, it is clear beyond dispute that it is the employers subject to the Act who must replace the funds in the Account.

It therefore seems apparent that the *Kennedy* court was wrong upon the facts before it and under the decisions upon which it purported to rely. But even if *Kennedy* were correct upon its own facts, it could have no application here. The factual distinctions are overwhelming:

(i) In *Kennedy,* the court was considering the injury to only one employer who was thought to have only a small, individual interest in the Account and in the payments to be made from it. Here, appellants sue on behalf of 775 railroads who contribute more than eighty-five percent of all amounts paid into the Account by the carriers; and the maintenance of this action has been expressly authorized by the Association of American Railroads to which many of those railroads belong (R. 2-3, 188).

(ii) In *Kennedy,* the total amount of the benefits involved was slightly more than $128,000 (189 F.2d at 803). Here, the unlawful expenditures have already exceeded $2,500,000 (R. 18, 199-200, 228).

(iii) At the time *Kennedy* was decided, the Account had a surplus "slightly in excess of 779 million dollars" and the rate of contribution by employers was "one-half of one percent." 189

F.2d at 805. The *Kennedy* court therefore felt that "the injury of which plaintiff is complaining is only a future possibility." 189 F.2d at 805. But in the fifteen years since *Kennedy* was decided, the surplus of $779,000,000 has been converted to a deficit of $250,000,000,* and the rate of tax has increased from one-half of one percent to an all-time high of four percent (Section 8(a)). The injury which the *Kennedy* court found to be "only a future possibility" has been felt in full measure.

Surely the employers have a right to be heard concerning the unlawful diversion of a fund to which they, almost alone, contribute. Indeed, the whole trend of the recent decisions has been to afford standing to all those who have a legitimate interest in the matters concerning which they complain. See the recent decision in *United Church of Christ v. FCC,* 359 F.2d 994, 1002 (D.C. Cir. 1966), where the court, in granting standing to members of the listening public to contest the renewal of a broadcasting license, observed:

> "[T]he concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding . . . ."

There is no doubt that appellants' interest in the maintenance of the integrity of the Account is both genuine and legitimate, and that is plainly all that is required to give them standing to challenge the unlawful actions of the Board. This is particularly so where, as here, if appellants have no standing to raise the issues now presented, there is no way in which those issues can ever be raised by anyone, and no fashion in which the Board can ever be prevented by judicial process from refusing to follow the statute or from acting in excess of its jurisdiction.

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*Footnote, page 6, *supra.*

B. THE DOCTRINE OF ADMINISTRATIVE DISCRETION DOES NOT IMMUNIZE THE BOARD'S DECISIONS FROM JUDICIAL REVIEW WHERE THE BOARD'S DISCRETION HAS NOT BEEN DELIBERATELY EXERCISED, WHERE ITS INTERPRETATION OF THE STATUTE WAS ERRONEOUS, AND WHERE IT HAS PROCEEDED IN EXCESS OF ITS STATUTORY JURISDICTION.

The District Court concluded that the actions of which appellants complain "involve matters of discretion" and that the members of the Board had acted within the limits of the discretion "vested in them by law" in permitting the payment of the benefits to the C(6) firemen (R. 143, 234, 252). The District Court made no attempt to exercise its own judgment concerning the meaning and effect of the statute, apparently regarding itself bound by judicial decisions limiting the scope of review of administrative actions (R. 141-43). The court's conduct in this regard was erroneous for at least three separate reasons: first, the court improperly assumed, in the presence of conflicting evidence, that the Board had deliberately exercised its discretion in a manner sufficient to invoke the doctrine of the limited review of administrative acts; second, the court failed to perceive that it was free to reject the Board's supposed interpretation of the substantive provisions of the statute if, as seems apparent, that interpretation was erroneous; and third, the court ignored the fact that there was and could be no room for an exercise of administrative discretion with respect to the Board's duty to follow the mandatory procedural provisions of the statute.

Though the District Court's determination that the Board had properly exercised its discretion under the statute was ultimately phrased as a conclusion of law,* that determination necessarily rests upon the underlying facts as to what the Board did and what reasons it gave for its actions. If there were no dispute

*Indeed, in the District Court's November 23, 1965, Memorandum of Decision, this determination was phrased as a finding of fact (R. 143), but was recast by appellees as a conclusion of law in their proposed findings and conclusions which were signed by the District Court without substantial change (R. 252).

concerning these underlying facts, the court's determination that there was no "genuine issue as to any material fact" (R. 234) might have been proper.

Such, however, was clearly not the case. Appellees' view of the facts, as adopted by the District Court in its findings, is that on June 5, 1964 the *Board,* rather than Mr. Carter, made a "general ruling" with respect to the eligibility of the C(6) firemen, and that, at least impliedly, the *Board* on that date adopted as the reasons for its supposed "general ruling" the reasoning now put forward by appellees in support of the Carter memorandum (R. 142, 250).

Appellants' view of the facts, a view amply supported by the record, is set forth in their proposed modification to Finding 12, which suggests the elimination of the reference to a "general ruling" by the Board (R. 237), and in their proposed addition to Finding 11:

> "The June 5, 1964 memorandum was issued by a staff member employed by the Railroad Retirement Board. The memorandum was never formally considered or approved by the Board. There is evidence that the Board did at some time 'informally approve' the 'policy underlying' the memorandum. This 'informal' approval was by a two to one vote. Mr. Healy, the Board member who disagreed with the majority, felt, as plaintiffs contend, that the eligibility of a claimant for benefits should be considered on an individual basis in each case. The Board did not, in fact, ever undertake to make any findings or conclusions with respect to the qualifications of C(6) firemen based on the circumstances of any particular case. Other than the effect, if any, of its 'informal' approval of the 'policy underlying' the Carter memorandum, the Board at no time made any findings or conclusions, either of a general or of a specific character, with respect to the qualifications of the C(6) firemen to receive unemployment benefits under the terms of the Act." (R. 237)

If appellants are correct in their view of the facts, there was plainly no exercise of discretion by the Board sufficient to invoke the doctrine of limited review of administrative acts. What was before the District Court, as appellants see it, was not a reasoned, well-considered determination of fact and law by the Railroad Retirement Board. It was, instead, an *ad hoc* ruling by a staff member, replete with conclusions and devoid of reasoning or analysis, which was "informally approved" by two out of three Board members and was still later fleshed out by the accretions of explanation, amplification, and rationalization provided in the numerous papers filed by appellees in these proceedings. No one will ever know whether all or any part of what is now said in support of the Carter memorandum ever occurred to Mr. Carter or even to the Board itself at the time the Carter ruling was "informally approved." Plainly, upon this view of the facts, there was no such exercise of administrative discretion as would preclude judicial review of the propriety of payments unauthorized by the statute. See *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 167-69 (1962), quoted at length at page 30, *supra.*

If, in the view of the District Court, the doctrine of administrative discretion was somehow relevant, the court should have ordered a trial on the merits of the disputed factual issues relating to the manner in which that discretion was supposedly exercised. By accepting appellees' view of the facts, ignoring that of appellants, and entering summary judgment in favor of appellees, the District Court necessarily violated the express condition of Rule 56(c) that summary judgment may be granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

Even if, however, the Board's approval of the Carter memorandum had, in fact, been a considered exercise of discretion, and even if the Board itself had then adopted the interpretation

of the Act now suggested by appellees, the propriety of the Board's action would hardly be beyond the power of the courts to review. The District Court assumed that all that was in issue was a question of law—in its own words an "interpretation of the law [Section 4(a-2) of the Act], as applied to the so-called C(6) firemen . . . ." (R. 142) The District Court apparently assumed further that it was bound to accept all of appellees' interpretations of the law, including their quite remarkable interpretations of the words "work" and "good cause" as found in Section 4(a-2) of the Act (R. 141-43). In this assumption, the court was clearly in error; for it is settled that an interpretation by an administrative body of its own governing statute will be disregarded by the courts where that interpretation is in fact unsound. See, *e.g., Social Security Board v. Nierotko,* 327 U.S. 358, 368-70 (1946); *American Ship Bldg. Co. v. NLRB,* 380 U.S. 300, 317-18 (1965); *NLRB v. Brown Food Store,* 380 U.S. 278, 290-92 (1965); *Coleman v. United States,* 363 F.2d 190 (9th Cir. 1966); Jaffee, *Judicial Control of Administrative Action,* pp. 572-79 (Little, Brown & Co. 1965).

As the Supreme Court has frequently noted, in connection with the scope of review of administrative determinations of law, a marked distinction exists between those situations in which the statutory authorization has been broadly phrased and the agency therefore "left at large," as in the case of the Interstate Commerce Act, and those situations where, as here, the statutory command is relatively precise. In the latter case, the agency must follow the statute or its order will be set aside. See, *e.g., Addison v. Holly Hill Fruit Prods., Inc.,* 322 U.S. 607, 616-17 (1944):

> "The wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is called, its details. But when Congress wants to give wide discretion it uses broad language. . . . In short [and in the present case] the

> Administrator was not left at large. A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispensing power of the Administrator. Exemptions made in such detail preclude their enlargement by implication."

The Supreme Court has been particularly assiduous in striking down erroneous administrative interpretations of statutory authority for agency action where ordinary, non-technical words—such as "work" and "good cause"—have been used and where, as is true in the present case, the meaning attributed to those words by the agency would tend to distort their ordinary meaning. See *Addison v. Holly Hill Fruit Prods., Inc.,* 322 U.S. 607, 617-18 (1944); *NLRB v. Highland Park Mfg. Co.,* 341 U.S. 322, 324-25 (1951).*

What the District Court was entitled to do, and what was indeed its duty, was to determine, not whether appellees had purported to interpret the statute, but whether their interpretation was correct. For a case which is in many respects comparable to the present, see *Social Security Board v. Nierotko,* 327 U.S. 358 (1946). In *Nierotko,* as in the present case, one of the questions at issue was the meaning of certain rather specific terms used in the substantive authorization of the agency. The precise issue was whether "back pay" which had been granted to an employee under the National Labor Relations Act should be treated as "wages" under the Social Security Act for the purpose

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*The fact that, out of supposed notions of "liberality" toward its client group, or otherwise, an agency might prefer a particular result at variance with the statute does not permit the statute to be ignored. See American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1964):

> "We are unable to find that any fair construction of the provisions relied on by the Board in this case can support its finding of an unfair labor practice. Indeed, the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the function of the sections relied upon. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."

of making credits to the Old Age and Survivors Insurance Account. The Social Security Board determined this question in the negative, and the Supreme Court reversed, holding that the agency determination had been "unsound." 327 U.S. 367. The argument that the court was bound by the "expert judgment" of the administrative agency was summarily rejected:

> "Administrative determinations must have a basis in law and must be within the granted authority. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function. . . .
>
> "We conclude . . . that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation." 327 U.S. at 369-70.

The preceding discussion has assumed, *arguendo,* that there was nothing more before the District Court than an erroneous administrative interpretation of the substantive provisions of the statute, and demonstrates that even under those circumstances the agency decision was subject to judicial review, and that the District Court should have determined, as it plainly failed to do, whether the statute was correctly interpreted and applied by appellees. But the matter of which appellants chiefly complain is not that appellees have simply made a mistake in their decision; it is, rather, that they have wholly ignored the mandatory procedural provisions of the statute setting forth the manner in which all Board decisions must be reached. The statute declares, in unmistakable terms, that the Board "is authorized and directed to make findings of fact with respect to any claim for benefits," including findings relating to question of disqualification of all individual applicants. Sections 5(b), 4(a-2). It is admitted that no individual findings were ever made (R. 91-92). It is also

painfully apparent that such findings were crucial to the eligibility of many, if not most, of the C(6) firemen. Even under appellees' construction of the statute, they were indispensable to the eligibility of those men who may have been offered other jobs as firemen (and therefore were disqualified under the Board's own regulations) (R. 226) and of those who quit their existing jobs before those jobs had been eliminated (and therefore necessarily "left work voluntarily") (R. 16).

This then, is the conclusive answer to the argument that appellees' conduct was shielded from judicial review by the doctrine of administrative discretion. Where, as here, public officials have acted in violation of the express command of the statute, there is no room for an argument that they have exercised their statutory discretion or that their actions are immune from judicial review. The cases all agree. See *Harmon v. Brucker,* 355 U.S. 579, 581-82 (1958):

> "In keeping with our duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case, we look first to petitioners' nonconstitutional claim that respondent acted in excess of powers granted him by Congress. Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. [Citations] The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available."

See also to the same effect, *NLRB v. Highland Park Co.,* 341 U.S. 322, 325-26 (1951); *Elmo Division of Drive-X Co. v. Dixon,* 348 F.2d 342, 344-45 (D.C. Cir. 1965).*

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*The decisions upon which the District Court relied (R. 143) are not to the contrary. In Adams v. Nagel, 303 U.S. 532 (1938), the Court

C. WHERE JUDICIAL REVIEW HAS NOT BEEN PROHIBITED BY CONGRESS, AND WHERE FEDERAL OFFICERS HAVE PROCEEDED IN VIOLATION OF STATUTE, A RIGHT OF JUDICIAL REVIEW UNQUESTIONABLY EXISTS.

The District Court concluded that the only provisions in the Act for judicial review of Board decisions were for appeals by employees of decisions denying their claims, and for appeals by the employers of decisions granting claims under circumstances where the employment relationship was denied (R. 143-44, 252). The court did not go further to decide whether the Act prohibits review under the circumstances here involved—the granting of claims where the employment relationship is not denied. This omission makes clear the District Court's confusion of two separate and distinct principles consistently recognized by the courts. It is one thing to find that Congress did not, in a particular statute, expressly provide for judicial review of particular action taken by the agency under that statute. *Cf. Stark v. Wickard,* 321 U.S. 288 (1944). It is wholly a different matter to conclude that Congress intended by the omission to prohibit all judicial review of such action. *Cf. Switchmen's Union v. National Mediation Bd.,* 320 U.S. 297 (1943). In failing to comprehend this distinction, the District Court failed to perceive the issue which it was called upon to decide.

The Supreme Court has held upon innumerable occasions that the courts of the United States have jurisdiction to review arbitrary agency action in all situations where review has not been pro-

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acknowledged that an officer would be restrained from acting in violation of his statutory authority (303 U.S. at 542). Udall v. Tallman, 380 U.S. 1 (1965), unlike the present case, involved a consistent interpretation by the agency of its own regulation, repeated over a period of years, acquiesced in by the Congress and relied upon to their detriment by numerous persons who had contracted with the United States; and even then, the administrative construction was accepted only because it was "quite clearly . . . reasonable" (380 U.S. at 4). Wilbur v. United States, 281 U.S. 206 (1930), was an action for mandamus and involved the question whether the relevant action was "ministerial" or "discretionary." Having determined that discretion was involved, the Court, *in an action for mandamus,* felt that it had reached the end of its inquiry.

hibited by Congress. See, *e.g., United States v. ICC,* 337 U.S. 426 (1949); *Stark v. Wickard,* 321 U.S. 288 (1944). No general prohibition of judicial review is contained in the Unemployment Insurance Act. The most that can be said is that the Act specifies a particular procedure for a review in selected and specific instances. Thus, in circumstances where an employee is denied a claim for benefits, and where an employer denies the fact of employment, the Act provides in section 5(c) for an administrative appeal, and in section 5(f) for judicial review by the Courts of Appeals. But no review proceedings, administrative or judicial, are either provided or prohibited with respect to a claim for unemployment benefits which has been granted.*

Section 5(c) also provides that in the two selected instances (where a claim for benefits is denied or the employment relationship is confirmed) the particular review procedure established in the Act is exclusive:

> "Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f)."

This proviso, however, obviously cannot have the effect of prohibiting judicial review of *other* decisions by the Board, as for example, a decision *granting* a claim for benefits. The proviso by its own terms includes only issues determinable under subsection (c) or subsection (f), and neither of these subsections has anything to do with a decision granting a claim for benefits where the employment relationship is not denied.

The fact that judicial review is expressly provided as to some matters neither compels nor suggests the conclusion that it is impliedly prohibited as to others. *Elmo Division of Drive-X Co. v. Dixon,* 348 F.2d 342, 344 (D.C. Cir. 1965), expressly so holds:

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*Except, of course, where the fact of employment is denied.

"The question we must resolve under A.F. of L. v. NLRB, supra, is thus whether Congress intended to foreclose District Court jurisdiction in the present case, given that its provision for Court of Appeals review does not per se preclude all District Court jurisdiction. Absent any clear directive in the statute itself or in the legislative history, it would seem necessary to decide this question on principle and by analogy to previous cases.

"So proceeding, we see no reason to bar District Court jurisdiction here, for relief in that court is appellant's only effective remedy, as we will demonstrate."

See also, to the same effect, *Fleming v. Moberly Milk Prods. Co.,* 160 F.2d 259 (D.C. Cir. 1947). Indeed, the present situation is much like that involved in *Stark v. Wickard,* 321 U.S. 288 (1944). There, as here, "the Act bears upon its face the intent to submit many questions arising under its administration to judicial review" and there, as here, "there is no direct judicial review granted by this statute for these proceedings." 321 U.S. at 307-08. The Court nevertheless found that jurisdiction existed to review matters not expressly dealt with by the review provisions of the statute:

"With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue . . . . Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." (321 U.S. at 309.)

Finally, subsection 5(g) of the Act provides:

"Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the

> determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this Act, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section."

These provisions, however, cannot properly be construed to preclude judicial review of the granting by the Board of the claims for benefits of the C(6) firemen. For one thing, subsection (g) precludes review only of those matters to which subsections (c) and (f) relate:* namely, proceedings concerning the *denial* of claims for benefits and the *confirmation* of the fact of employment, while the issue in this action is the legality of the *granting* of claims for benefits where the employment relationship is not in issue. For another, subsection (g) declares to be binding and conclusive, with respect to claims, only the "findings of fact," "conclusions of law," and "determination[s]" of the Board. In the present case, however, it is the very absence of the statutory findings, conclusions, and determinations of which appellants complain, and the subsection, therefore, is expressly inapplicable.

Thus, as it turns out, the statute is wholly silent upon the matter of review of Board decisions of the sort now before this Court. Appellees' argument is therefore necessarily reduced to the proposition that, even though Congress has not spoken upon the subject, an intent to preclude judicial review of such decisions must nevertheless be implied. The argument, however, proves far too much. It assumes a prohibition of all judicial review, not only under circumstances where the Board has simply abused its dis-

*Except for the matter of the availability of unexpended funds for the payment of benefits, a question which, for present purposes, is immaterial.

cretion or where it has merely made a mistake, but also where, as here, the Board has ignored the command of the statute and has proceeded in excess of its statutory jurisdiction. As the Supreme Court has repeatedly held, an intent on the part of Congress to prohibit judicial review in such circumstances cannot and will not be assumed. See, *e.g.:*

United States v. ICC, 337 U.S. 426, 433-34 (1949):

"Under the contention the order is final and not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law.

"Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships. See, *e.g., Shields v. Utah I.C.R. Co.,* 305 U.S. 177, 181-85; *Stark v. Wickard,* 321 U.S. 288, 307-10. And this Court has consistently held Commission orders reviewable upon charges that the Commission had exceeded its lawful powers."

Stark v. Wickard, 321 U.S. 288, 309-10 (1944):

"When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."

Leedom v. Kyne, 358 U.S. 184, 188 (1958):

"This case, in its posture before us, involves 'unlawful action of the Board [which] has inflicted an injury on the [respondent].' Does the law, 'apart from the review provisions of the . . . Act,' afford a remedy? We think the answer surely must be yes. This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike

> down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act."

For authority to the same effect see also *Harmon v. Brucker,* 355 U.S. 579, 581-82 (1958); *Parker v. Fleming,* 329 U.S. 531, 534-38 (1947); *Fleming v. Moberly Milk Prods. Co.,* 160 F.2d 259, 264-65 (D.C. Cir. 1947).* Indeed, the thrust of appellees' argument—that no court at any place or time or under any circumstances can compel them to obey the statute—would, if accepted, raise substantial problems under the Constitution of the United States; for those, like appellants, who bear the burdens of the Board's unlawful conduct would then have no opportunity whatever to be heard either by the Board or by the courts. Yet, as Justice Brandeis said in his concurring opinion in *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 77, 84 (1936), such is the very essence of due process:

> "[T]here must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it.
>
> . . .
>
> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous

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*Appellees argue (R. 215-16), and the District Court may have believed (R. 143-44), that the issue of judicial review of the Board's action under the circumstances of this case had been set to rest in Railway Express Agency v. Kennedy, 189 F.2d 801 (7th Cir. 1951), *cert. denied,* 342 U.S. 830 (1951). On the contrary, both the District Court and the Court of Appeals in *Kennedy* assumed, in considering the issue as presented there, that the Board had in fact performed its statutory duty to make findings with respect to eligibility for benefits. See the opinion of the District Court:

> "[The] statute requires the Board as such to make investigations, findings and determinations, as to the right of employees to receive unemployment compensation. When made, they are conclusive of the subject with right of appeal under the statute only on behalf of objecting employees." (95 F.Supp. at 788).

See also the opinion of the Court of Appeals at 189 F.2d 803. Since the Board failed to follow the statute with respect to the C(6) firemen, the *Kennedy* decisions are not in point.

rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly."

See also *Estep v. United States,* 377 U.S. 114 (1946); *Crowell v. Benson,* 285 U.S. 22 (1932); Jaffee, *Judicial Control of Administrative Action,* pp. 381-89 (Little, Brown & Co. 1965); *Cf. Stark v. Wickard,* 321 U.S. 288, 310 (1944); *Bodison Mfg. Co. v. California Employment Comm'n,* 17 C.2d 321, 109 P.2d 935 (1941).

There is no occasion to resolve such Constitutional questions here, for the decisions of the Supreme Court make it unmistakably clear that jurisdiction exists to review actions of the Board which are in excess of its statutory authority.

D. THE DOCTRINE OF SOVEREIGN IMMUNITY DOES NOT PRECLUDE JUDICIAL REVIEW OF ACTS OF THE BOARD IN EXCESS OF THE AUTHORITY CONFERRED BY ITS GOVERNING STATUTE.

Appellees contended repeatedly before the District Court that this action is an unconsented suit against the United States of which the courts have no jurisdiction (R. 76-77, 111-19, 210-12). Yet, appellees admit, as they must, that the doctrine of sovereign immunity does not bar actions to enjoin conduct "by officers beyond their statutory powers" (R. 113). This, however, is precisely such an action; for it is the refusal of appellees to comply with the mandatory procedural provisions of the statute and the payment by them of benefits in violation of that statute which appellants seek to enjoin. Obviously, therefore, there is nothing to the suggestion that the action is barred by the doctrine of sovereign immunity. The very cases upon which appellees rely (R. 111) so hold.* Indeed, this Court itself so held as recently as 1963. See *De Masters v. Arend,* 313 F.2d 79, 85 (9th Cir. 1963), where this Court collected the cases dealing with the doctrine of sovereign immunity and concluded:

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*See, *e.g.,* Land v. Dollar, 330 U.S. 731, 738 (1947); Larson v. Domestic & Foreign Corp., 337 U.S. 682, 701-04 (1959).

"However, if appellants were indeed prohibited by Section 7605(b) or the Fourth Amendment from initiating this inquiry, a suit to restrain their unlawful conduct would not be barred by sovereign immunity."

E. THE C(6) FIREMEN ARE CLEARLY NOT INDISPENSABLE PARTIES, WHERE AS HERE, THEIR ULTIMATE LEGAL INTERESTS WILL NOT BE AFFECTED AND THEY CANNOT IN ANY EVENT BE JOINED.

Appellees argued below (R. 126-27), and may contend here, that each of the thousands of C(6) firemen claiming unemployment benefits is an indispensable party and that, in the absence of any single one of these firemen, the action cannot proceed. Of course, if the action cannot proceed without each of the firemen, it cannot proceed at all, since the firemen are scattered through many States, and there is no procedure by which jurisdiction over all of them could be obtained.

According to traditional terminology, parties to a litigation are divided into four general categories: "improper" parties, "proper" parties, "necessary" parties, and "indispensable" parties. The distinction between the categories is based upon the relationship which the absent party has to the controversy. A party whose interest is so remote that he ought not to be in court is an improper party; a party who has a more immediate and extensive interest in the controversy will fall within one of the three latter categories, depending upon the extent of his interest. Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom,* 61 Colum. L. Rev. 1254 (1961). A party, therefore, is not indispensable merely because he possesses an interest in the controversy. It is not enough to argue, as appellees did in the District Court, that the C(6) firemen are indispensable parties *because* they may have an interest in the outcome of this litigation, for even if the argument were correct, it would establish only that these firemen would not be "improper" parties.

In *Shields v. Barrow,* 58 U.S. 130 (1854), the Supreme Court of the United States set out a definition of indispensable parties which has been followed ever since. Indispensable parties were defined as:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (58 U.S. at 139.)

According to this formulation, the indispensable party rule has a two-fold purpose: First, to protect the absent party from litigation which attempts to adjudicate his interest without his presence; and second, to protect the parties presently before the court from vexatious litigation when the relief afforded would otherwise be abortive and incomplete. Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19,* 74 Yale L. J. 403, 405-06 (1965).

When these principles, as formulated by the Supreme Court in *Shields,* are applied to the litigation pending before this Court, it becomes apparent that the firemen are not indispensable parties. This litigation does not involve the adjudication of whether any single C(6) fireman is or is not qualified to receive unemployment benefits. To the contrary, the litigation will determine only whether the Board, in awarding such benefits, must comply with the statutory mandate that it make findings of fact regarding the claimant's qualifications for benefits. Nor is it necessary for the C(6) firemen to be present in order for this Court to render complete relief to the present parties consistent with "equity and good conscience." A judgment in appellants' favor would not preclude a single C(6) fireman from claiming unemployment benefits; nor would it deprive him of the right of judicial review of his claim. Such a judgment would require only that the Board comply with the statutory command that it determine, upon the basis of the facts of the particular case, whether the claimant is qualified for unemployment benefits. In connection with such a procedure, each of the firemen would be entitled to an initial determination as to his own qualifications for benefits. Each fireman dissatisfied

with that determination would have the statutory right to a hearing before a referee; to an appeal directly to the Board; and finally, to judicial review of the Board's decision in the Courts of Appeals. During all such administrative and judicial proceedings, each fireman would be free to make whatever assertions and to take whatever positions he might choose, excepting only the position that the Board is free to ignore the statutory requirements and to grant his claim without first finding that he is qualified to receive benefits.

Appellees' argument is thus reduced to the proposition that the absent C(6) firemen have an interest in securing unemployment benefits from the Board without compliance with the statutory requirement that the Board make findings to determine whether they are qualified, and that this interest has such dignity that each fireman is an indispensable party to this action. Merely to state the proposition is to refute it, for if it were true, then any party who is affected by the application of any statute would be an indispensable party to an action to determine the procedures provided by that statute. This Court recently held in *Reich v. Webb,* 336 F.2d 153 (9th Cir. 1964), *cert. denied,* 380 U.S. 915 (1965), that depositors and members of a savings and loan association had no right to intervene in a suit brought by the association against the Federal Home Loan Bank Board to enjoin the Board from conducting further administrative proceedings regarding certain transactions by the association. It was argued there, as it is here, that the absent parties had an interest in the litigation since "they might be adversely affected by a distribution or other disposition of property" of the association. 336 F.2d at 155. In denying the intervention, this Court impliedly concluded that despite this interest the absent parties were not indispensable to the action.

The Supreme Court of the United States has said that the question of "indispensability of parties is determined on practical considerations." *Shaughnessy v. Pedreiro.* 349 U.S. 48, 54 (1955). *Accord, Homestake Mining v. Mid-Continent Exploration Co.,*

282 F.2d 787, 797 (10th Cir. 1960). The fact that absent parties may have some technical and indirect interest in the outcome of the controversy is not sufficient to make them indispensable. This interest must be balanced against the desire that the parties before the court should be given some adjudication, rather than left without remedy, particularly where, as here, it is not possible to bring the absent parties before the court.

Indeed, the whole trend of the federal decisions has been to restrict the number of parties who are considered indispensable. Moreover, the recent amendment by the United States Supreme Court to Rule 19 of the Federal Rules of Civil Procedure emphasizes that the indispensable party doctrine is to be given a liberal view in accordance with equitable and discretionary factors. As amended, F.R.C.P. 19(b) provides:

> "If a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

It is clear, as previously demonstrated, that a judgment can be rendered granting complete relief to the present parties without legal prejudice to the rights of the absent firemen. However, if the firemen were held to be indispensable, no remedy could ever be granted to the present parties by any court. Such a result would clearly be contrary both to the Federal Rules and to established judicial decisions. As the Supreme Court of the United

States said in *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 70-71 (1936):

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. [citing cases]
>
> We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in."

Surely, having this admonition in mind, this Court should be reluctant to apply the policy of indispensability in such a fashion as to prevent any judicial determination whatever of the questions presently in issue.

III. Appellants Were and Are Entitled to the Declaratory and Injunctive Relief Sought by Them in the District Court.

A. APPELLANTS ARE ENTITLED TO A DECLARATION THAT THE PAYMENTS MADE TO THE C(6) FIREMEN WERE AND ARE UNAUTHORIZED BY THE STATUTE.

Appellants prayed below for a declaration (i) that the Board has proceeded in excess of its statutory jurisdiction in permitting the payment of unemployment benefits to the C(6) firemen without exploring the individual facts upon which eligibility for benefits necessarily rested, and (ii) that the Board, in the circumstances of this case, was and is under a mandatory duty to consider, upon the basis of the individual circumstances, which of the C(6) firemen claiming benefits were ineligible because they had "left work voluntarily" without "good cause" or had, by their refusal of the comparable jobs, "failed, without good cause, to accept suitable work" (R. 28-30).

Appellants believe that they have demonstrated that the Board failed entirely to perform its statutory duty to make findings

based upon the individual circumstances where those circumstances were crucial to the question of eligibility—and that this conclusion necessarily follows even if appellees' rather remarkable interpretations of the meaning of the statute were to be accepted. Appellants have also shown that appellees' interpretations of the words "work" and "good cause" as used in the statute—the interpretations upon which their whole position is based—are wholly at odds with the meaning and purpose of the Act, and must, therefore, be rejected. Appellants therefore were and are entitled to the declaratory relief sought by them in the District Court. Since, however, each of the foregoing matters is entirely clear from the record, this Court need not remand the case to the District Court for the making of findings and conclusions consistent with its decision, but may itself grant appellants the declaratory relief prayed for in the complaint. 28 U.S.C. § 2106 (1964); *Smith v. Dravo Corp.*, 208 F.2d 388, 391-92 (9th Cir. 1953). It will then remain for the Board, in the light of this Court's decision, to consider, upon the basis of the individual circumstances, the eligibility of all C(6) firemen making application for benefits.

There is only one possible situation in which further proceedings in the District Court might be considered appropriate—that situation which would be presented if this Court concluded that appellees' present interpretation of the statute might be entitled to some weight if that interpretation had in fact been made by the Board in a considered exercise of its discretion. In that event, the case might be remanded for a trial on the merits of the disputed issues of fact relating to what the Board did and the reasons it gave for its actions. In appellants' view of the case, however, there is, under the principles applicable to judicial review of administrative action, no occasion for such a determination; for if, as seems clear, appellees' interpretation of the statute is incorrect, it would acquire no additional lustre even if it had been that of the Board. See the authorities cited and discussed in part II B, *supra*.

B. APPELLANTS ARE ENTITLED TO PRELIMINARY AND PERMANENT INJUNCTIONS FORBIDDING THE PAYMENT OF FURTHER UNEMPLOYMENT BENEFITS TO THE C(6) FIREMEN UNTIL SUCH TIME AS THE BOARD COMPLIES WITH THE STATUTORY COMMAND THAT IT MAKE FINDINGS UPON THE MATTER OF ELIGIBILITY.

Appellants' initial motion for a preliminary injunction was made on October 25, 1965. The motion was denied by the District Court on November 23 on the grounds that the Board had acted within its discretion and that appellants had no standing to sue (R. 143-45).* At the time the District Court declined to preserve the status quo pending the litigation, unemployment benefits were being paid out to the C(6) firemen at a rate of approximately $20,000 to $25,000 each week (R. 21, 227-28).

Believing that the District Court was in error, appellants renewed their motion for a preliminary injunction, presenting additional materials intended to show that the Board had not in fact exercised any discretion, statutory or otherwise, and that appellants in fact had a justiciable interest in the unlawful waste of the Account (R. 188-201, 203-07). There is no doubt that such a procedure was proper. See *Red Star Yeast & Prods. Co. v. La Budde,* 83 F.2d 394 (7th Cir. 1936); Nichols, *Cyclopedia of Federal Procedure,* Section 73.49 (3d ed. 1965). The renewed motion for a preliminary injunction was submitted for decision on April 22, 1966. As of that date, unemployment benefits were then being paid out in the approximate amount of $12,750 each week (R. 228). The District Court did not rule upon the renewed motion for preliminary relief until after a period of more than eleven weeks had gone by (R. 262)—and until, by extrapolation, an additional $140,250 would have been paid out. The injunction

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*The court also ultimately found that the issuance of a preliminary injunction would "adversely" affect the interests of the public and the C(6) firemen (R. 251). The word "adversely" is that of appellees, having been inserted by them in their proposed findings, though it was not used by the court in either of its memorandum decisions. The finding must, in any event, be disregarded, since it is wholly unsupported by the record.

was then denied, without further discussion, "for the reasons set forth" in the court's earlier memorandum (R. 233-34).

It seems quite clear that, under the applicable authorities, appellants were entitled to the preliminary injunctive relief which was denied them by the District Court. The decision of the Supreme Court of the United States in *Ohio Oil v. Conway,* 279 U.S. 813 (1929), is closely in point. See also *Burton v. Matanuska Valley Lines, Inc.,* 244 F.2d 647, 650-51 (9th Cir. 1957), where this Court restated and reiterated the rule of the *Conway* decision.

The District Court did not dispute the fact that many thousands of dollars would be paid out to the C(6) firemen before the controversy could be resolved upon its merits. On the contrary, the court found that "the Board has paid out and will pay out substantial sums of money from the Railroad Unemployment Insurance Account pursuant to the above administrative ruling." (R. 251) The District Court nevertheless denied the applications for preliminary relief upon the theory that appellants would be unlikely to prevail upon the merits with respect to the questions of administrative discretion and standing (R. 143-44). In this conclusion, the court not only erred upon the merits, as has already been shown; it also failed to give due consideration to the rule of this Circuit that the court must entertain a motion for preliminary relief if there is a "possibility that the plaintiff may make out a case upon the merits." *Ross-Whitney Corp. v. Smith Kline & French Labs.,* 207 F.2d 190, 194 (9th Cir. 1953). The fact that some of the issues presented on the merits might involve jurisdictional questions, does not, of course, alter the rule. *American Fed'n of Musicians v. Stein,* 213 F.2d 679, 683 (6th Cir. 1964).

The orders denying a preliminary injunction were therefore in error, and should be reversed by this Court.* The case should be remanded with directions that the District Court enter a permanent injunction forbidding the payment of any further benefits to the C(6) firemen unless and until the Board complies with the provisions of the statute requiring it to make factual determinations concerning the matter of eligibility. In the alternative, and if this Court concludes that further proceedings in the District Court would be desirable, this Court's mandate should include directions that the District Court issue its order forbidding any further payments to the C(6) firemen until the final determination of such proceedings and of any appeals which may follow from them.

CONCLUSION

The necessary implication of appellees' arguments, as well as of the decisions of the District Court, is that neither this nor any other court has power to review the conduct of the Board, no matter how unlawful or improper that conduct might be and without regard to whether the Board has elected to ignore any or all of the provisions of the statute creating its power to act. Appellants respectfully submit that the judicial decisions invoked in support of this remarkable thesis will not bear such a burden; and that this Court clearly has the power to restrain appellees' unlawful actions and thereby ensure the integrity of the Account.

The judgments below should, therefore, be reversed; appellants should be awarded the declaratory relief prayed for by them in the complaint; and the District Court should be directed to enter

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*It will not do to argue that the denial of preliminary relief, in the circumstances presented here, constituted an exercise of the "discretion" of the District Court and is therefore subject only to limited review. Because of its conclusion that appellants had no standing to sue and that the conduct of the Board was shielded by the doctrine of administrative discretion, it seems plain that the District Court failed to exercise the discretion possessed by it under the law.

its permanent injunction forbidding further payment of unemployment benefits to the C(6) firemen, unless and until the Board complies with the command of the statute that it make findings of fact relating to eligibility.

Dated: San Francisco, California, November 30, 1966.

Respectfully submitted,

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Of Counsel

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

BURNHAM ENERSEN

(Appendices Follow)

Appendix A

Paragraph C(6) of the Arbitration Award.

C(6). All other firemen (helpers) with less than 10 years' seniority on the effective date of this Award shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified. The offer of another job shall carry with it relocation expenses as provided for and under the conditions set forth in Section 10 of the Washington Job Protection Agreement of May 21, 1936, the continuation of accumulated seniority rights toward such purposes as vacation and other applicable fringe benefits, and guaranteed annual earnings, for a period not exceeding 5 years, equal to the total compensation received by each such employee as fireman (helper), hostler helper, hostler, or engineer during the last 12 months in which compensation was received prior to the date of transfer. Such offers of jobs shall be posted and made available to all qualified firemen (helpers) in order of seniority in the seniority district in which the job offered is located. If, within 7 days after notice is posted, no senior man elects to take such offered job, the most junior man then on the fireman (helper) roster in that seniority district must, within 3 days from receipt of written notice, accept the job or all of his employment and seniority rights and relations shall be terminated and, in that event, he shall be entitled to one-half the severance allowance provided for in paragraph C(3) of this Award. If such junior fireman (helper) shall fail to accept such job and thereby terminates his employment as herein provided,

the next most junior fireman (helper) on that same roster must accept the job within 3 days from receipt of written notice or forfeit all of his employment and seniority rights and relations with the allowance provided for above. In each case of refusal to accept such job offer the next most junior fireman (helper) shall be required to accept, as provided for above, or forfeit his employment and seniority rights and relations with, in each case, the allowance provided for above, until there are no firemen (helpers) with less than 10 years' seniority remaining on the seniority roster for the seniority district in which the job offer is located. Thereafter, the same procedure as is provided above shall be followed in the fireman (helper) seniority district which has its principal extra list for firemen (helpers) closest to the location of the job offered.

Appendix B

Selected Provisions of the Railroad Unemployment Insurance Act.

SECTION 1(k)

(k) Subject to the provisions of section 4 of this Act, (1) a day of unemployment, with respect to any employee, means a calendar day on which he is able to work and is available for work and with respect to which (i) no remuneration is payable or accrues to him, and (ii) he has, in accordance with such regulations as the Board may prescribe, registered at an employment office; . . . .

SECTION 4

DISQUALIFYING CONDITIONS

SEC. 4. (a-1) There shall not be considered as a day of unemployment or as a day of sickness, with respect to any employee—

(i) any of the seventy-five days beginning with the first day of any registration period with respect to which the Board finds that he knowingly made or aided in making or caused to be made any false or fraudulent statement or claim for the purpose of causing benefits to be paid;

(ii) any day in any period with respect to which the Board finds that he is receiving or will have received annuity payments or pensions under the Railroad Retirement Act of 1935 or the Railroad Retirement Act of 1937, or insurance benefits under title II of the Social Security Act, or unemployment, maternity, or sickness benefits under an unemployment, maternity, or sickness compensation law other than this Act, or any other social insurance payments under any law: *Provided,* That if an employee receives or is held entitled to receive any such payments, other than unemployment, maternity, or sickness payments, with respect to any period which include days of unemployment or sickness in a registration period, after benefits under this Act for such

registration period will have been paid, the amount by which such benefits under this Act will have been increased by including such days as days of unemployment or as days of sickness shall be recoverable by the Board: *Provided further,* That, if that part of any such payment or payments, other than unemployment, maternity, or sickness payments, which is apportionable to such days of unemployment or days of sickness is less in amount than the benefits under this Act which, but for this paragraph, would be payable and not recoverable with respect to such days of unemployment or days of sickness, the preceding provisions of this paragraph shall not apply but such benefits under this Act for such days of unemployment or days of sickness shall be diminished or recoverable in the amount of such part of such other payment or payments;

(a-2) There shall not be considered as a day of unemployment, with respect to any employee—

(i) (A) subject to the provisions of subdivision (B) hereof, any of the days in the period beginning with the day with respect to which the Board finds that he left work voluntarily, and continuing until he has been paid compensation of not less than $750 with respect to time after the beginning of such period;

(B) if the Board finds that he left work voluntarily with good cause, the provisions of subdivision (A) shall not apply, with respect to him, to any day in a registration period if such period does not include any day which is in a period for which he could receive benefits under an unemployment compensation law other than this Act, and he so certifies. Such certification shall, in the absence of evidence to the contrary, be accepted subject to the penalty provisions of section 9(a) of this Act;

(ii) any of the thirty days beginning with the day with respect to which the Board finds that he failed, without good cause, to accept suitable work available on such day and offered to him, or to comply with instructions from the Board requiring him to apply for suitable work or to report, in

person or by mail as the Board may require, to an employment office;

(iii) subject to the provisions of subsection (b) of this section, any day with respect to which the Board finds that his unemployment was due to a stoppage of work because of a strike in the establishment, premises, or enterprise at which he was last employed, and the Board finds that such strike was commenced in violation of the provisions of the Railway Labor Act or in violation of the established rules and practices of a bona fide labor organization of which he was a member.

(b) The disqualification provided in section 4 (a-2) (iii) of this Act shall not apply if the Board finds that—

(i) the employee is not participating in or financing or directly interested in the strike which causes the stoppage of work: *Provided,* That payment of regular union dues shall not be construed to constitute financing a strike or direct interest in a strike within the meaning of this and the following paragraphs; and

(ii) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed in the establishment, premises, or enterprise at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute: *Provided,* That if separate types of work are commonly conducted in separate departments of a single enterprise, each such department shall, for the purposes of this subsection, be deemed to be a separate establishment, enterprise, or other premises.

(c) No work shall be deemed suitable for the purposes of section 4(a-2) (ii) of this Act, and benefits shall not be denied under this Act to any otherwise qualified employee for refusing to accept work if—

(i) the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(ii) the remuneration, hours, or other conditions of work offered are substantially less favorable to the employee than those prevailing for similar work in the locality, or the rate of remuneration is less than the union wage rate, if any, for similar work in the locality;

(iii) as a condition of being employed he would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(iv) acceptance of the work would require him to engage in activities in violation of law or which, by reason of their being in violation of reasonable requirements of the constitution, by-laws, or similar regulations of a bona fide labor organization of which he is a member, would subject him to expulsion from such labor organization; or

(v) acceptance of the work would subject him to loss of substantial seniority rights under any collective bargaining agreement between a railway labor organization, organized in accordance with the provisions of the Railway Labor Act, and any other employer.

(d) In determining, within the limitations of section 4(c) of this Act, whether or not any work is suitable for an employee for the purposes of section 4(a-2)(ii) of this Act, the Board shall consider, in addition to such other factors as it deems relevant, (i) the current practices recognized by management and labor with respect to such work; (ii) the degree of risk involved to such employee's health, safety, and morals; (iii) his physical fitness and prior training; (iv) his experience and prior earnings; (v) his length of unemployment and prospects for securing work in his customary occupation; and (vi) the distance of the available work from his residence and from his most recent work.

(e) For the purposes of section 4(a-2)(i) of this Act, no voluntary leaving of work shall be deemed to have been without good cause if the Board finds that such work would not have been suitable for the purposes of section 4(a-2)(ii) of this Act.

SECTION 5

CLAIMS FOR BENEFITS

SEC. 5. (a) Claims for benefits and appeals from determinations with respect thereto shall be made in accordance with such regulations as the Board shall prescribe. Each employer shall post and maintain, in places readily accessible to employees in his service, such printed statements concerning such regulations as the Board supplies to him for such purpose, and shall keep available to his employees copies of such printed statements. Such printed statements shall be supplied by the Board to each employer without cost to him.

(b) The Board is authorized and directed to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits. The Board is further authorized to hold such hearings, to conduct such investigations and other proceedings, and to establish, by regulations or otherwise, such procedures as it may deem necessary or proper for the determination of a right to benefits.

(c) Each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one which is reviewable pursuant to one of the succeeding paragraphs of this subsection shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto.

Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded the benefits at less than the proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and

to report to the Board thereon together with recommendations. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the appeals provided for in this paragraph and for decisions upon such appeal.

In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this Act but which denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. The Board may also designate one of its officers or employees to receive evidence and report to the Board whether or not any person or company is entitled to a refund of contributions or should be required to pay contributions under this Act, regardless of whether or not any claims for benefits will have been filed upon the basis of service in the employ of such person or company, and shall follow such procedure if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that such person or company is or will not have been liable for such contributions. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceedings and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations govern-

ing the proceedings provided for in this paragraph and for decisions upon such proceedings.

Final decision of the Board in the cases provided for in the preceding two paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party notified, as hereinabove provided, of his right to participate in the proceedings may obtain a review of any such decision by which he claims to be aggrieved or the determination of any issue therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this Act, of every party notified as hereinabove provided of his right to participate in the proceedings.

Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f).

(d) The Board shall prescribe regulations governing the filing of cases with and the decision of cases by reviewing bodies, and the review of such decisions. The Board may provide for intermediate reviews of such decisions by such bodies as the Board may establish or assign thereto. The Board may (i) on its own motion review a decision of an intermediate reviewing body on the basis of the evidence previously submitted in such case, and may direct the taking of additional evidence, or (ii) permit such parties as it finds properly interested in the proceedings to take appeals to the Board. Unless a review or an appeal is had pursuant to this subsection, the decision of an intermediate reviewing body shall, subject to such regulations as the Board may prescribe, be deemed to be the final decision of the Board.

(e) In any proceeding other than a court proceedings, the rules of evidence prevailing in courts of law or equity shall not be controlling, but a full and complete record shall be kept of all proceedings and testimony, and the Board's final determination, together with its findings of fact and conclusions of law in connection therewith, shall be communicated to the parties within fifteen days after the date of such final determinations.

(f) Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within fifteen days after receipt of service, or within such additional time as the court may allow, the Board shall file with the court in which such petition has been filed the record upon which the findings and decision complained of are based, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise

entitled by a law to precedence. It shall have power to enter a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

An applicant for review of a final decision of the Board concerning a claim for benefits shall not be liable for costs, including costs of service, or costs of printing records, except that costs may be assessed by the court against such applicant if the court determines that the proceedings for such review have been instituted or continued without reasonable ground.

(g) Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this Act, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section.

(h) Except as may be otherwise prescribed by regulations of the Board, benefits payable with respect to any period prior to

the date of a final decision of the Board with respect to a claim therefor, shall be paid only after such final decision.

(i) No claimant or other properly interested person claiming benefits shall be charged fees of any kind by the Board, its employees or representatives, with respect to such claim. Any such claimant or other properly interested person may be represented by counsel or other duly authorized agent, in any proceeding before the Board or its representatives or a court, but no such counsel or agent for a claimant shall either charge or receive for such services more than an amount approved by the Board or by the court before whom the proceedings of the Board are reviewed. Any person who violates any provision of this subsection shall be punished by a fine of not more than $10,000 or by imprisonment not exceeding one year.